Supreme Court U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD A. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE, AND **NICOLE M. PETRONE,** A MINOR, BY AND THROUGH HER FATHER, RICHARD P. PETRONE,
Petitioners,

V.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the wake of the tragic shooting at Columbine High School in April 1999, school officials invited students and hundreds of community members to participate in an art project designed to foster community healing. Students, friends and family members, alumni, police, firemen, ambulance attendants and hospital workers were all invited to paint four-inch by four-inch tiles, to be affixed to the school's hallways. Tiles were painted at locations both on and off school property while classes were not in session. School officials strictly enforced only one rule relating to the viewpoint of the expression on the tiles – a prohibition on religious symbols of any kind. School officials eventually ordered custodians to chisel all "religious" tiles from the walls. The Tenth Circuit Court of Appeals held that the tiles constituted "school-sponsored speech" and that *Hazelwood School District v. Kuhlmeier* permitted school officials to censor tiles because of their religious viewpoint. Petitioners present the following questions:

I. Whether *Hazelwood School District v. Kuhlmeier* permits viewpoint-based discrimination against religious speech where the speech, consisting solely of private expression, is deemed by school officials to be "school-sponsored."

II. Whether the tile-painting project constituted "school-sponsored" speech within the meaning of *Hazelwood School District v. Kuhlmeier*, or remained instead a limited public forum.

PARTIES TO THE PROCEEDING

All parties to the proceedings in the Tenth Circuit are listed in the caption of the Petition. Jefferson County School District R-1 board members Jon DeStefano, Tori Merritts, David R. DiGiacomo, Debby Oberbeck and Vince Chowdhury were Defendants in the District Court, but did not participate in the appeal.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the decision and judgment of the Tenth Circuit Court of Appeals, which held that the Supreme Court's decision in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), sanctioned Respondent's policy of censoring religious symbols from artwork generated by community members in a forum for expression created by school officials.

OPINIONS BELOW

The Opinion of the Tenth Circuit Court of Appeals, dated June 27, 2002, appears as Appendix A hereto, and is reported at 298 F.3d 918 (10th Cir. 2002). The unpublished Order denying the petition for rehearing and amending the Opinion, dated August 16, 2002, appears as Appendix B. The unpublished Judgment of the United States District Court for the District of Colorado, filed November 7, 2001, appears as Appendix C. The Findings of Fact, Conclusions of Law and Order entered by the United States District Court for the District of Colorado on November 1, 2001, appear as Appendix D, and are reported at 170 F.Supp.2d 1094 (Dist. CO 2001). The unpublished Order Amending Findings of Fact, Conclusions of Law and Order, filed November 6, 2001, appears as Appendix E.

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Petitioners' federal claims pursuant to 28 U.S.C. § 1331. The court entered Findings of Fact, Conclusions of Law and an Order disposing of all claims and all parties on November 1, 2001. App. D; Court of Appeals Appendix ("C.A. App.") at 101-53. The court entered an Order Amending Findings of Fact, Conclusions of Law and Order on November 6, 2001. App. E; C.A. App. at 158. The court's Judgment was entered on November 7, 2001. App. C; C.A. App. at 161; 13 (docket entry). Respondents filed timely Notice of

Appeal on November 5, 2001. C.A. App. at 12 (docket entry). *See* FED. R. APP. PROC. 4(a)(2).

The Tenth Circuit Court of Appeals entered its Decision on June 27, 2002. App. A. Petitioners filed a timely Petition for Reconsideration or in the Alternative, for Rehearing *En Banc* on July 11, 2002. The Court of Appeals entered an order denying the petition on August 16, 2002. App. B. The jurisdiction of this court is properly invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONST., AMEND. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

A. Factual History.

In July and August of 1999, Columbine High School

officials invited students and members of the general public to participate in an art project. Columbine officials planned for the project to be an opportunity for students and community members to "reclaim" their school from the acts of violence that had occurred there some three months earlier when two former students gunned down twelve students and one teacher. The purpose of the project, as Respondent stated in its press releases (App. D28, ¶ 21; C.A. App. at 291), was twofold. First, school officials believed that students would become more comfortable with the surroundings of the school by coming into the school building to participate in the project. Second, school officials wanted to give students an opportunity to be involved in the reconstruction of the school by allowing them to paint tiles. Respondent's employees testified that the project was designed to give members of the public a chance to express themselves regarding the process of healing from the trauma caused by the shooting.[1]

1

> A. .... The original tile project was to decorate the school. After April 20, it did become a way of healing, a way of getting in touch with each other and with yourself.

App. I3 (Testimony of Puanani Warnke).

> Q. .... After the shooting, the tile project that the community participated in was to help with the healing process, correct?
> A. Correct.
> Q. The purpose was to allow students, community members, whoever painted tiles, to express themselves as part of the healing process, correct? * * * *
> THE WITNESS: It would be a – anytime you put something down on tile or paper would be an opportunity for people to express themselves, correct.
> Q. And it was expression in connection with the healing process, was it not?
> A. Correct.

Students, families and friends of students, families and friends of former students who were murdered or injured in the shooting or others associated with the school, alumni, police, firemen, ambulance attendants and hospital workers were invited by school officials to paint four-inch by four-inch tiles, which were to be affixed to the walls of the school's hallways.[2] Anyone who appeared at a tile painting session was allowed to participate, and teachers and volunteers monitoring the tile painting sessions did not check the identities of participants.[3] The media was invited to one of the sessions. C.A. App. at 292.

App. K1-K2 (Testimony of Frank DeAngelis).

[2] Respondent's employee, area administrator Barbara Monseu, described the project as consisting of designing tiles "that would be affixed to the interior of the building, in the hallways." C.A. App. 554.

[3]

> Q. So the tile painting that morning [of July 19, 1999] was not limited strictly to Columbine High School. No?
> A. We didn't even ask for Ids when people came in.* * * *
> Q. All right. What do the photos on page 4 of Plaintiff's Exhibit 10 show?
> A. These are from the alumni picnic that we had on July 25. I'm sorry, I don't know if it's the 24th or 25th now. It was a Sunday.
> Q. And was that picnic at Columbine High School?
> A. No. It was at Columbine Knolls Park.
> Q. Now, was that restricted to alumni painting, or could somebody else paint tiles?
> A. Anybody who showed up painted a tile. Again, we didn't ask for IDs. It was parents, alumni, their kids, grandkids. Neighbors.

App. H5, H6 (Testimony of Barbara Hirokawa).

Respondent's area administrator, Ms. Monseu, approved the tile project and quickly crafted restrictions on viewpoint. *See* Lodging at L38, handwritten memorandum regarding guidelines. When explaining the project to the school board and other administrators, she said, "This is a project outside of the school, this is a separate project, but we're trying to keep track of what's going on, not necessarily control everything, but keep track of what's going on." C.A. App. at 562-63. Tiles and supplies for the project came from private donations. C.A. App. 112-13, 354-56.

When the participants, including Petitioners, arrived at the tile-painting sessions, they were provided with no written guidelines or instructions, and were not told what to paint on the tiles. App. H1 (Diedra Fleming); J1 (Don Fleming). However, school officials informed participants that they must not include any type of religious symbol in their artwork. *Id.* Further, the tiles were not to include anything obscene or any reference to the shooting, the date of the shooting, or the names of the victims.[4] *Id.* Respondent's

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[4] Respondent's employees testified that the restrictions on religious symbols, names, and the date of the shooting were necessary to remove all reminders of the shooting from the hallways of the school to prevent students from being traumatized, and to prevent the tile project from becoming a memorial to the victims. C.A. at 116. However, Respondent's officials placed numerous reminders of the shooting and memorials to the victims in and around the school, including a framed poster that read, "God wept over Columbine this day, April 20, 1999," Lodging L11; a plaque that said, "In honor of those who lost their lives or those who had their lives changed forever on April 20, 1999;" a frame containing a victim's jersey and other memorabilia; and a sandstone memorial to slain teacher Dave Sanders installed at the entrance to the school's softball field, renamed "Sanders Memorial Field." C.A. App. 116-17, 219, 289-90. Moreover, the halls of Columbine High School contained mobiles with religious symbols and references, Lodging at L10, and a time line of the history of art including copies of many religious works. C.A. App. 118, 270-77.

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employees were not instructed on which religious symbols and expression would not be permitted.[5] One teacher, Barbara Hirokawa, testified:

> Q. Now, how did you determine if something was a religious symbol and shouldn't be painted?
> A. Anything that was an obvious religious symbol. Angels, kids were trying to do angels in the morning, crosses. If we had had any stars of David or anything like that, we would [125] eliminated those, too.
> Q. What sort of thing did you consider an obvious Christian symbol, for example?
> A. Cross.
> Q. Anything else?

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[5] The teachers who monitored the tile painting sessions testified:

> Question: Do you know what was considered to be a religious symbol that was inappropriate to put on a tile.
> Answer: No, I don't.

App. at I7 (Testimony of Elizabeth Keating – By Deposition).

> Q. How did you decide which symbols were religious symbols, which symbols weren't religious symbols if you didn't have a list.
> A. Basic knowledge.
> Q. What do you mean basic knowledge?
> A. Most people in the United States know that the cross stands for Christianity, that the star of David stands for Judaism. Islam has the crescent moon and star.

App. I2-I3 (Testimony of Puanani Warnke). Nonetheless, "basic knowledge" apparently did not extend to Eastern religions, since the *yin-yang* symbol of Taoism was placed on the wall. *See* Lodging L17, top right photograph.

A. Angels.
Q. What about the Christian fiche [*sic*] symbol, or do you know what I mean by the Christian fish symbol?
A. We didn't think of that at first, but it was – it was not – you know, it was something that was recognizable, so we were saying, you know, do designs. I don't remember running across that at that particular day or at least in the morning when I was helping the kids.
Q. All right. So you could not paint, for example, a star of David?
A. Right.
Q. And what is a star of David? Can you describe it?
A. It's a six-pointed star.
Q. Okay, so a five-pointed star was okay, was it not?
A. Probably.

App. H7-H9 (Testimony of Barbara Hirokawa).

Many participants, including Petitioners, were offended by the restrictions. Petitioner Susan Petrone had planned to paint a tile with a heart, a small cross, and her murdered son's name. She painted the tile anyway. *See* Lodging L3. Petitioner Richard Petrone painted one tile with a "stick man" and the name of the murdered student who would have been his stepson, Daniel Rohrbough. L4. Mr. Petrone also painted a tile containing a cross, the letters L-O-V-E, and a peace sign. *Id.* Petitioner Nicole Petrone, Daniel Rohrbough's sister, painted a tile with a rose, a heart, a small yellow cross, and her brother's name. L3. Daniel's father, Petitioner Brian Rohrbough, painted one tile with 13 red crosses and another tile with a Bible verse that stated, "There is no peace says the Lord for the wicked" and containing Daniel's name. L1.

Petitioner Lisa Rohrbough's experience was typical of Petitioners'. Ms. Rohrbough (then Lisa Maurer) painted a tile with the words "Jesus Christ is Lord," and the initials "D.R." L2. She also painted a tile containing a heart, a fish symbol, a small hill with three crosses, and the initials "D.R." *Id.* She testified:

Q. And what does the tile at the top show us?
A. The top tile is a tile that were symbols that gave me comfort and peace. The fish symbol, which to me means peace. And beside that are the three crosses representing Christ and the two thieves that day at Calvary, and I've always drew that as a child, so it brings me comfort. In the other corner is Dan's initials. And in the bottom corner is a heart which to me symbolizes love. * * * *
Q. And what is shown on the second tile you painted there at the bottom of page 2 of Plaintiffs' Exhibit 1?
A. On the bottom tile are Dan's initials, a cross, and Jesus Christ is lord.
Q. Why did you paint that tile?
A. I painted that tile because after Columbine, after April 20, 1999, the one thing that has and continues to keep me functioning and going is my knowledge that Dan is with Jesus and that I'm going to see him again; and even on the worst of days, that's what sustains me and the only memory that – I have good memories of Dan from when he was here and [290] alive, but the memory I have now that always stays with me is that I'll see him again, and that's only possible because Jesus Christ is the lord.

App. I4-I5 (Lisa Rohrbough). Ms. Rohrbough explained, "I can't paint tiles without religious symbols because it wouldn't be being true to myself or my memory of Dan." App. I5.

Respondent's employee Barbara Hirokawa testified about Ms. Rohrbough's tile:

Q. [128] Let's look at page 2 of Exhibit 1, the tile, the upper portion of that page. Is that a tile that was not allowed to be put up on the wall? * * * *
A. Yes.
Q. And why not?
A. Because there's crosses on a hill.

Q. If there had been trees on a hill, you wouldn't have had problems with it?
A. Yes. Because the crosses came to stand for not just the – this happens to be three which is a representation of the crucifixion, but also with the crosses on Rebel Hill.
Q. So if there had been three trees on the hill, you wouldn't have had a problem with that?
A. Probably not.

App. H8-H9 (Hirokawa).

Petitioner Deidra Fleming was the mother of Kelly Fleming, who was murdered at Columbine. Ms. Fleming had planned to paint a tile with the date of the shooting, "4/20/99," and the words "Jesus Wept." However, those seated around her told her that this was not allowed. Mrs. Fleming testified:

Q. How did you feel when you found out about the restrictions?
A. I just felt deflated. I was crushed that I couldn't paint what I had come there to paint.
Q. Why did you want to paint that particular tile?
A. For me, God was a very important part of that date. And Jesus wept, for me, stated that he, along with the rest of the world, stood there at the horror that happened that day and he wept.

App. H3 (Diedre Fleming).

Kelly Fleming's father, Petitioner Donald Fleming, also wanted to paint a tile with the date "4/20/99" and the words "Jesus Wept," but was prevented from doing so by the school's restrictions.

Q. Why did you want to paint that particular tile?
A. That is – that's the tile, when we were originally asked back in June or July to paint the tiles, that's the tile that we discussed that would be most appropriate from both of our points of view.

Q. How did you feel when you found out that you couldn't paint the tile that you wanted to paint? * * * *
A. I felt like – personally, I felt like I was stabbed in the heart, and I was very offended.

App. J1-J2 (Donald Fleming).

Many painted tiles were never affixed to the walls by Columbine officials because they contained religious connotations or other prohibited expression. However, area administrator Monseu subsequently discovered that some tiles containing prohibited expression had been affixed to the walls. Acting on instructions from Ms. Monseu, Assistant Principal Patricia Patrick then conducted an evaluation of each and every painted tile, marked those she deemed "inappropriate," and instructed the custodian to chisel every marked tile from the wall. App. J6 - J8. However, again, Ms. Monseu did not explain what religious expression was prohibited.[6]

Ms. Patrick admitted that numerous tiles were removed because they appeared to contain crosses.[7] *E.g.*, L19 - L31.

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Q. [386] Did she tell you what type of tiles would have religious symbols or religious connotations so that you should remove them?
A. No.
Q. She just left that to your discretion?
A. Yes.

App. J7 - J8 (Patricia Patrick).

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Q. [399] Okay. Would you please look at page 5 of Exhibit 11, the top photograph? * * * Can you tell me why that tile was removed?
A. Because it appears like there's a cross on that tile.* * *
Q. [403] Well, let's look at the tile in photo 77. On page 18. Do you see that?

Others were removed because they appeared to depict angels. *E.g.*, L26, L32 - L34. However, tiles that appeared to depict similar non-religious figures such as fairies were left on the walls. *E.g.*, L17. One tile, depicting a large angelic wing in the clouds surrounded by small crosses (L26), may have been removed for either reason, Ms. Patrick testified, though she admitted it was a close call.[8] Ms. Patrick further testified that tiles that depicted fish were acceptable, but those that depicted the Christian fish symbol (*see* Photo, L35) were not.[9]

A. Yes.
Q. Why was that tile removed?
A. Because of the crosses.

App. J8 - J9.

8

Q. Now, would you agree that that shows some type of wings up in the sky with clouds?
A. Yes.
Q. If those crosses had been stars, would you have removed it?
A. I probably would have because of the wings on this, probably.
Q. Wings were on the list of things to be removed?
A. Well, it's a judgment call. That's a judgment call.
Q. Are the wings some kind of religious symbol?
A. I may have left it up. It would be hard. I may have left it up or I may have taken it down.

App. J9 - J10 (Patrick).

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Q. What about photograph 0114 on the same page. Why was that taken down?
A. Because it appeared to be a fish.
Q. There is something wrong with fish on the walls?
A. Other than it is a religious connotation.

Of the approximately 2,100 tiles that had been affixed to the walls, eighty to ninety tiles were removed. *See* Lodging at L19 - L35. These included Petitioner Nicole Petrone's tile. Lodging at L3. The actions of Ms. Monseu, Ms. Patrick and the other employees of Respondent in censoring tiles containing religious symbols were expressly in furtherance of Respondent's policy. Board member Jon DeStefano acknowledged that the removal of the tiles "was in adherence to our policy." App. at J4 (Jon DeStefano). He testified:

> Q. Did you approve of taking down the religious symbols that had been put up?
> A. We approved of our policy being upheld, absolutely.
> Q. So that's a yes, that you and the board –
> A. Absolutely.

App. at J4 (DeStefano).

As a result of the strong objections of participants in the tile-painting project to the restrictions on their expressions, Ms. Monseu held two separate meetings with Petitioners and other participants. At the first meeting, Ms. Monseu reiterated that tiles containing religious symbols would not be affixed to the school's walls. C.A. App. 115. At the second meeting, however, Ms. Monseu relaxed other restrictions by allowing families of the victims to paint tiles with their children's names, initials, dates other than April 20th, and the Columbine ribbons, and said these tiles would be put up in the school. C.A. App. 116. In other words, the only restrictions that were left in place were those prohibiting religious symbols, the date

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> Q. Is this an example of the Christian fish, then?
> A. That's how I interpreted it.
> Q. It didn't have the Christian fish, but it just had the word "truth," would it have been left on the walls? * * * *
> A. Probably would have been left.

App. J6 - J11 (Patrick).

of the shooting, or anything obscene or offensive.[10] For example, Ms. Monseu testified that under the amended policy, tiles that included a child's name, such as Petitioner Susan Petrone's tile, Lodging L3, would have been acceptable but for their religious content.[11]

B. Proceedings in The District Court.

Believing that the school's discrimination against their religious expression was unconstitutional, Petitioners filed suit against school

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Q. .... After September 9, 1999, the families were free to put their child's name on a tile?
A. That is correct.
Q. They were free to put the child's initials on a tile?
A. That is correct.
Q. They were free to use a Columbine ribbon?
A. That is correct.
Q. [184] But it's your recollection that they were not free to use the date 4-20-99.
A. Correct.

App. H16 (Monseu)

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Q. [188] And the bottom photograph, it's a yellow cross superimposed on a heart?
A. Yes, I do [see it].
Q. And under your new criteria, would not have been put up either?
A. Correct.
Q. And if the cross is removed, then the heart and the name Dan Rohrbough could be put up?
A. Correct.

App. at H17 (Monseu).

officials, alleging violations of the Free Speech Clause and Establishment Clause of the First Amendment as well as violations of their free speech rights under the Colorado Constitution. *See* Appendix F, Complaint. In attempting to justify its censorship of religious expression, Respondent argued that the tiles painted by Petitioners constituted government speech, or, alternatively, school-sponsored speech to which the relaxed *Hazelwood* standard of review applied. *See* Appendix G, Answer to Complaint, paras. 13 - 17 at G3 - G5. The District Court rejected both of these arguments and moved on to determine whether the tile-painting project constituted a forum. 170 F.Supp.2d at 1107-08. The court agreed with Petitioners that the school had created a limited public forum by opening access to the expressive project to a broad segment of the community. *Id.* at 1111.

Finally, the District Court considered whether the restrictions imposed on participants in the tile project were viewpoint-neutral and reasonable in light of the forum's purpose. The court held that the restriction on religious symbols constituted prohibited viewpoint-based discrimination and applied strict scrutiny to said restriction. *Id.* at 1113-15. The restriction did not survive strict scrutiny because the District Court found that the school's asserted interest in avoiding an Establishment Clause violation was not compelling. *Id.* at 1115. The court reasoned that the school would not have violated the Establishment Clause if it had merely allowed equal access to the forum for religious and secular views. *Id.*

C. The Court of Appeals.

A three-judge panel of the Tenth Circuit Court of Appeals granted an emergency appeal and reversed the District Court's decision based upon an analysis that was markedly different from that conducted by the District Court. The Tenth Circuit first concluded that the tile project constituted school-sponsored speech, and thus was governed by the *Hazelwood* standard. 298 F.3d at 924. According to the Tenth Circuit's broad interpretation, the restrictive *Hazelwood* standard governs expression in any

school activity that can be said to "affect learning" if the speech might reasonably be perceived to bear the imprimatur of the school. *Id.* at 925.

The Tenth Circuit next held that the *Hazelwood* standard permits public high school officials to discriminate against expression on the basis of the viewpoint expressed, including the religious viewpoints of Petitioners. *Id.* at 926. The court noted that a split exists among the Circuits on this issue:

> Our sister circuits have split over whether *Hazelwood* requires that schools' restrictions on school-sponsored speech be viewpoint neutral. Most recently, a panel of the Third Circuit expressed its view that *Hazelwood* does not require viewpoint neutrality of school districts [citing *C. H. ex rel Z. H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1999), ~~*aff'd on other grounds*~~, *vacated for en banc review*, *C. H. ex rel Z. H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000)(*en banc*), *cert. denied*, *Hood v. Milford Township Bd. of Educ.*, 533 U.S. 915 (2001)].... The First Circuit reached a similar conclusion in *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993).... On the other side of the debate, the Ninth Circuit in *Planned Parenthood* held that *Hazelwood* required viewpoint neutrality [citing *Planned Parenthood of S. Nev., Inc. v. Clark Cty Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991)].... A subsequent panel of that Circuit, however, recently has criticized that holding. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, *Downs v. Los Angeles Unified Sch. Dist.*, 532 U.S. 994 (2001).... A divided panel of the Sixth Circuit in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), stated, without discussion, that the *Hazelwood* Court 'noted' that non-viewpoint-based restrictions were part of its analysis.... Finally, the Eleventh Circuit has expressed doubts that the *Hazelwood* Court intended to "drastically rewrite First Amendment law to allow a school official to

> discriminate based on a speaker's views," *Searcey v. Harris*, 888 F.2d 1314, 1319 *n.*7 (11th Cir. 1989), and stated it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral."

Id. at 926-28 (text superseded by Order of June 27, 2002 overstruck; text added by Order underlined).

Despite acknowledging the Eleventh Circuit's cautionary note, and in the face of more than a decade of Supreme Court precedent consistently reiterating that viewpoint discrimination is the most egregious type of content discrimination, the Tenth Circuit held that the Court's decision in *Hazelwood* permits school officials to engage in viewpoint discrimination. *Id.* at 928. The court reasoned that this conclusion followed logically from this Court's emphasis upon the "uniqueness of the public school setting and the deference with which it viewed decisions made by educators." *Id.*

Turning to the application of *Hazelwood* according to that interpretation, the Tenth Circuit held that the tile project did not constitute a traditional or designated public forum. *Id.* at 929. While noting Petitioners' argument that the tile project was a limited public forum, the court did not appear to consider this possibility, apparently because it considered a limited public forum to be a mere subset of a nonpublic forum. *Id.* at n10. The Tenth Circuit did not attempt to reconcile its holding that viewpoint discrimination was permissible under *Hazelwood* with its acknowledgment that this type of discrimination is generally prohibited even in a nonpublic forum. *Id.*

The Tenth Circuit held that "[b]ecause the school permanently integrated the tiles into the school environment, and was significantly involved in the creation, funding, supervision, and screening process of the tile project," the tiles bore the imprimatur of the school. *Id.* at 931. The court further held that the school's restriction on religious symbols was reasonably related to pedagogical interests. *Id.* at 933. The court acknowledged out that Respondent could not have succeeded in defending its actions based on Establishment Clause concerns; however, the court accepted Respondent's

argument that the restriction was necessary because religious references might serve as a "reminder of the shooting." *Id.* The Tenth Circuit disregarded the fact that the entire tile project was a reminder of the shooting for those involved, and the fact that tiles containing thirteen "secular" symbols (stars, flowers, butterflies, tear drops, etc.), or otherwise memorializing the thirteen victims, were placed the hallways, along with other reminders such as tiles with initials of slain students. *See, e.g.*, Lodging at L12 (13 columbines, 13 stars), L13 (clock face at 11:10, when shooting began; initials of student Matthew J. Kechter), L14-L16 (13 tears, stars, butterflies). Likewise, it agreed with school officials that they had a legitimate pedagogical interest in preventing the walls from becoming "a situs for religious debate, which would be disruptive to the learning environment." *Id.* The Tenth Circuit disregarded the uncontroverted testimony of school district officials that there had never been any disruptions because of religion or religious symbols in the school. C.A. App. 118. The Court of Appeals thereby validated Respondent's discrimination against religious expression in its tile project.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTING VIEWS AMONG THE CIRCUIT COURTS REGARDING WHETHER *HAZELWOOD* PERMITS PUBLIC SCHOOL OFFICIALS TO IMPOSE VIEWPOINT-BASED RESTRICTIONS ON SPEECH THAT IS DEEMED "SCHOOL-SPONSORED."

A. The Tenth Circuit's Decision is in Direct Conflict With Decisions of the Ninth and Eleventh Circuits Regarding Whether the *Hazelwood* Standard Permits Public School Officials to Impose Viewpoint-Based Restrictions on Student Speech.

The Eleventh and Ninth Circuits have directly held that the *Hazelwood* standard does not permit viewpoint-based speech restrictions. The Tenth Circuit's holding is thus in direct conflict with the Eleventh Circuit's decision in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) and the Ninth Circuit's holding in *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. den., Downs v. Los Angeles Unified Sch. Dist.*, 532 U.S. 994 (2001).

In *Searcey*, an organization challenged a school board's refusal to allow it to participate in the school's "Career Day" because of the organization's viewpoint regarding military service. *Id.* The Eleventh Circuit specifically considered the board's argument that the *Hazelwood* standard permits educators to make viewpoint-based decisions. *Id.* at 1324. The Eleventh Circuit adamantly rejected that notion, expressing its doubt that the *Hazelwood* Court intended to "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views." *Id.* at 1319, n.7. The court stated:

> Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis.

Id. at 1325 (citations omitted, emphasis in original). In reaching this conclusion, the Eleventh Circuit pointed to traditional First Amendment jurisprudence, in which viewpoint discrimination has been prohibited in non-public forums. *Id.* at 1324.

The Ninth Circuit also has held that restrictions imposed by a school on "school-sponsored speech" must be viewpoint-neutral. *Downs*, 228 F.3d at 1011. The court appeared reluctant to reach this conclusion, noting that the *Hazelwood* decision did not explicitly require viewpoint neutrality. *Id.* at 1010. However, the Ninth Circuit found that it was compelled by its own precedent to

require viewpoint-neutrality in the context of restrictions on school-sponsored speech. *Id.* at 1011. Significantly, in the case that the *Downs* court felt compelled to follow in this respect, *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991)(*en banc*), the full Ninth Circuit appeared to have assumed that *Hazelwood* did not vitiate the long-standing rule that government restrictions on speech may not be based on viewpoint, but it did not discuss this point. In *Planned Parenthood* the Ninth Circuit stated:

> Having concluded that the advertising pages in the school district's school-sponsored publications are nonpublic forums, we now consider whether the school's justification for refusing to publish Planned Parenthood's advertisement is reasonable. Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and *are viewpoint neutral.*

Planned Parenthood, 941 F.2d at 829 (emphasis added, internal citations omitted).

Both the Ninth and Eleventh Circuits have thus directly held that the *Hazelwood* standard does not open a new and dramatic loophole in First Amendment jurisprudence by permitting school officials to implement viewpoint-based speech restrictions. The Tenth Circuit has rejected the wisdom of its sister Circuits on this issue. The First Circuit, a subsequent panel of the Third Circuit, and the Seventh Circuit have indicated their probable alignment with the view expressed by the Tenth Circuit in this regard, as explained hereinafter.

Petitioners request that this Court grant their petition for a writ of certiorari to resolve this direct conflict between Circuits. Religious expression that occurs in the school context is subject to viewpoint-based restriction in the six states comprising the Tenth Circuit, while this type of restriction is prohibited in at least two other Circuits. Such an incongruous interpretation of the First

Amendment, which implicates not only the freedom of speech but also, as Petitioners' experience demonstrates, religious expression and exercise, should not go unresolved by this Court.

B. Considerable Divergence Exists Between the Circuits as to the Proper Application of the *Hazelwood* Standard.

The Tenth Circuit itself noted the split among the Circuits as to the proper application of the *Hazelwood* standard with respect to viewpoint-based restrictions on "school-sponsored" speech. 298 F.3d at 926-28. As catalogued by the Tenth Circuit, a recent panel of the Third Circuit and the First Circuit have indicated their respective beliefs that the *Hazelwood* standard would permit high school officials to restrict expression because of its viewpoint, while the Ninth, Sixth and Eleventh Circuits have indicated their respective opinions that *Hazelwood* would not permit viewpoint-based restrictions. *Id.* at 926-27.

In addition to the explicit conflicts noted above with the Ninth and Eleventh Circuits, the Tenth Circuit's decision is in implicit conflict with the Third Circuit's earlier decision in *Brody v. Spang*, 957 F.2d 1108 (1992), and the Sixth Circuit's decision in *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001). The Third Circuit in *Brody*, commenting on *Hazelwood*, stated that "since the [Supreme] Court found that the newspaper was a non-public forum, it further held that any reasonable *non-viewpoint-based* restrictions were acceptable, provided that school officials' regulations were 'reasonably related to legitimate pedogogical concerns.'" *Brody, supra*, at 1118 (emphasis added). The Tenth Circuit noted that "[a] divided panel of the Sixth Circuit in *Kincaid* stated, without discussion, that the *Hazelwood* Court 'noted' that non-viewpoint-based restrictions were part of its analysis." 298 F.3d at 927, citing *Kincaid*, 191 F.3d at 727.

Oddly, the Tenth Circuit explicitly based its holding that the *Hazelwood* standard permits high school officials to implement

viewpoint-based speech restrictions on reasoning from a Third Circuit decision subsequent to *Brody* that had actually been vacated nearly three years prior to the Tenth Circuit's decision. *Id.* The Tenth Circuit relied upon the Third Circuit's opinion in *C. H. ex rel. Z. H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), which was vacated at 197 F.3d 63 (3d Cir. 1999). A 1992 panel, as noted above, had ruled that viewpoint discrimination was not allowed by *Hazelwood*. Half of the *en banc* Third Circuit in 1999 agreed when it vacated the panel decision in *C.H. v. Oliva, supra.*

Other Circuits appear to align themselves with the Tenth Circuit's view. The First Circuit has stated that *Hazelwood* "did not require that school regulation of school-sponsored speech be viewpoint neutral." *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). It appears that the Seventh Circuit would follow this view as well. In *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464 (7th Cir. 2001), the Seventh Circuit considered a challenge to a high school official's censorship of a cross from a mural proposed by the Bible Club in response to the school's invitation to all student groups to paint murals in the school's hallways. 274 F.3d at 467. Judge Posner, writing for the court, indicated that the Seventh Circuit would likely uphold school officials' viewpoint-based suppression of speech if the school officials asserted that such suppression was necessary to maintain "order and discipline." *Id.* at 467. The court relied upon *Hazelwood* for the proposition that school officials may exercise greater control over student speech than the state is permitted to exercise over the free speech of adults in "the normal venues." *Id.* Then the court stated that "order and discipline" are part of any school's basic educational mission and thus provide adequate justification for speech restrictions. *Id.* At no point did the court indicate any concern about the fact that the school official had censored controversial viewpoints. Rather, it held that this fact provided the very justification for the school's actions.

> [T]here was no evidence of discrimination against the Bible Club.... [The principal's] reaction to the swastika, and to

> the naming of a brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that he reasonably believed likely to lead to litigation or disorder.

Id. at 466.

The widespread variance in the Circuits' interpretations of *Hazelwood* means that the important question of whether or not religious students and community members are protected from viewpoint-based discrimination turns on the geographical location in which their speech occurs. Petitioners submit that certiorari is particularly appropriate in this case, as there is a dramatic divergence in the Circuits' approach to evaluating viewpoint-based speech restrictions in the context of the nation's public schools.

II. CERTIORARI SHOULD BE GRANTED TO CORRECT THE COURT OF APPEALS' DRAMATIC DEPARTURE FROM THE SUPREME COURT'S FIRST AMENDMENT PUBLIC SCHOOL JURISPRUDENCE.

A. This Court's Precedents Have Consistently Held that Viewpoint-Based Discrimination is Not Permitted in a Limited Public Forum or a Non-Public Forum.

This Court has repeatedly and consistently held that government actors may not impose viewpoint-based restrictions on speech, whether the expression occurs in a limited public forum or a non-public forum. As Justice Brennan once stated, "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62 (1983)(Brennan, J., dissenting). This same rule pertains in a public school setting; in fact, the Court has never countenanced viewpoint based exclusion of private religious views from public school settings.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court indicated that even in an educational setting, once a government entity opens any type of forum, it assumes "an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. *See also Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001). In *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985), this Court explained that in a non-public forum, government officials may not deny access to a speaker solely to suppress his point of view. *Cornelius*, 473 U.S. at 806.

While *Widmar* applied First Amendment forum analysis in the context of a public university, the Court applied the same analysis in *Lamb's Chapel*, where the challenged policy governed public elementary and secondary schools. *Lamb's Chapel* was factually similar to Petitioners' case in that those who sought access to the school's forum were excluded solely on the basis of their religious viewpoint. The Court reiterated that even in a non-public forum, restriction or limitation of access to the forum may not be based on the particular viewpoint that the speaker wishes to express.

> [The] subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid under our holding in *Cornelius*....

Id. at 392-93, *citing Cornelius*, 473 U.S. at 806. Likewise, in his concurrence in *Lamb's Chapel*, Justice Kennedy indicated that the Court unanimously agreed that school officials' overt, viewpoint-

based discrimination contradicted the First Amendment. *Id.* at 397 ("Given the issues presented as well as the apparent unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment...")(Kennedy, J., concurring).

In *Good News Club v. Milford Central School*, *supra*, the Court again announced that viewpoint-based discrimination is not permissible in a limited public forum, even where that limited public forum exists in the context of a public school. "[W]e reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." 533 U.S. at 111-12. In *Good News Club* as in *Lamb's Chapel*, the court appears to have been unanimous on this point.

Finally, while the Tenth Circuit purported to rely on *Hazelwood* in reaching its conclusion that public high school officials are permitted to restrict expression based on its viewpoint, *Hazelwood* itself does not support such a holding. In *Hazelwood* the Court upheld the public high school's censorship of articles prepared by students for the school's newspaper. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). The articles addressed the sensitive issues of teen pregnancy and divorce. *Id.* at 263. This Court held that school officials may restrict "school-sponsored" speech that occurs in a non-public forum provided that the restriction is reasonably related to legitimate pedagogical concerns. *Id.* at 270-73. However, the case did not involve any question of viewpoint discrimination. The Court ruled only that "educators do not offend the First Amendment by exercising editorial control over the style and *content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added).

None of this Court's First Amendment precedents appear to support the Tenth Circuit's holding that public high school officials may impose viewpoint-based speech restrictions. To the contrary, the Court's previous holdings have consistently and adamantly

maintained that viewpoint-based restrictions are repugnant to the First Amendment. Petitioners request that this Court grant their petition for a writ of certiorari to clarify, once and for all, that state actors may not restrict expression based on its religious viewpoint, even in the context of a public school, and to put to rest the notion that *Hazelwood* provides a loophole to this pinnacle of First Amendment analysis.

B. This Court's Precedents Have Uniformly Held that the First Amendment Forbids Government Actors to Suppress Ideas Simply Because they Might Cause Controversy or Offense.

The Tenth Circuit's decision represents a grave and substantial departure from this Court's unwavering commitment to its interpretation of the First Amendment as precluding censorship of expression based solely on the viewpoint of the expression. If the Tenth Circuit's decision stands, it will vitiate at least two of this Court's holdings to that effect.

First, this Court stated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) in no uncertain terms, that this type of censorship is impermissible under the First Amendment.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of

> Americans who grow up and live in this relatively permissive, often disputatious, society.

393 U.S. at 509 (internal citations omitted).

The Tenth Circuit's decision flies in the face of *Tinker* because it allows public high school officials to suppress speech simply because they believe that the speech might create controversy or cause emotional discomfort. The uncontroverted facts in Petitioners' case indicate that there had never been a single incident of disturbance caused by religious controversy at Columbine High School. *Tinker* is apparently considered a dead letter in the Tenth Circuit inasmuch as the Tenth Circuit validates restrictions on student speech even where the restrictions are based entirely on school officials' "undifferentiated fear or apprehension of disturbance." Moreover, according to the Tenth Circuit's interpretation of *Hazelwood*, community members as well have lost virtually all First Amendment protection in any expressive activity that can be squeezed into the "school-sponsored" category. Public school officials are permitted total discretion to restrict speech in this context when it expresses ideas that they disfavor. The only limit to this broad discretion vested in school officials is the requirement that they articulate some "legitimate pedagogical concern" that supports the restriction. And according to the Tenth Circuit, a school official's fear that the expression may cause controversy will suffice.

The Court of Appeals' decision also substantially undermines the holding of *Board of Educ. of Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982), in which the Court ruled that "local school boards may not remove books from the school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion.'" The contents of public school library shelves certainly bear the imprimatur of the school in the same manner as, or more than, the tiles involved in the tile project. But in the Tenth Circuit, if school officials may banish religious expression from an art project in which public participation was invited simply because they

are unwilling to endure the "controversy" it might produce or any unpleasant feelings it may elicit from students, surely they enjoy at least as much discretion to remove controversial books from the school library. The Tenth Circuit's decision in this case may well give educators license to remove from school library shelves such controversial books as *The Catcher in the Rye*, *1984*, *Brave New World*, *Lord of the Flies*, *The Autobiography of Malcom X*, and the *Holy Bible*. The Tenth Circuit thus misses the point in observing that viewpoint neutrality would require Respondent to post a tile that states "God is Hate" if it posts one stating "God is Love." 298 F.3d at 932, n.14. Rather, in its regime allowing Respondents to employ viewpoint discrimination, Respondents could choose to display a tile that states "God is Hate" (or "God is Love," or "God is a Myth") with no obligation to post tiles that express other viewpoints.

Finally, the Tenth Circuit's opinion vitiates at least three of this Court's precedents that have uniformly held that school officials may not impose restrictions on religious speech that are not imposed on secular speech. *See Board of Educ. of the Westside Community Sch. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel, supra; Good News Club, supra*. According to the Tenth Circuit's opinion in Petitioners' case, school officials are at liberty to single out religious expression and banish it from any activity that can be said to be "school-sponsored." In fact, the Tenth Circuit's decision likely *ensures* that religious speech *will be* singled out for disfavored treatment, because it explicitly validated the fear of religious controversy as a legitimate pedagogical concern that will justify censorship. 298 F.3d at 933. Thus, the Tenth Circuit has turned traditional First Amendment jurisprudence on its head. Religious and political expression, which heretofore had enjoyed the highest level of First Amendment protection, now are the easiest targets for school-imposed restrictions simply because these types of

expression are deemed inherently controversial by school officials.[12]

C. The Tenth Circuit Permits *Hazelwood* to Circumvent the Supreme Court's Establishment Clause Jurisprudence.

A startling effect of the Tenth Circuit's interpretation of *Hazelwood* is that it allows school officials to suppress religious expression in a "school-sponsored" activity simply because it is religious while avoiding the traditional requirement that they justify this type of suppression by demonstrating a realistic danger that the school would risk an Establishment Clause violation by permitting the expression. The record in Petitioners' case reveals that Establishment Clause concerns were the real impetus for the school's prohibition of "religious" tiles. App. at H18, I1 - I2 (Monseu); J2 - J6 (DeStefano). The Tenth Circuit recognized the fallacy of the school's reasoning in this regard. 298 F.3d at 933. Nonetheless, the Tenth Circuit found that the speech restrictions passed constitutional muster because they fell within the *Hazelwood* standard, which, as interpreted by the Tenth Circuit, allows virtually any speech restrictions.

The Supreme Court has repeatedly held that government officials cannot exclude private religious expression from a public forum solely because of concern about avoiding an Establishment Clause violation, when the effect of allowing the religious expression would be to maintain neutrality between religious and non-religious expression. *See, e.g., Board of Educ. of the Westside*

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[12] Although the Court of Appeals concluded by assuring that despite its conclusion that *Hazelwood* countenances viewpoint discrimination, "[a] number of constitutional restraints continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process," 298 F.3d at 934, it does not even attempt to explain how these constitutional rights could circumscribe its holding that unwanted private expression may be censored by school officials.

Community Sch. v. Mergens, 496 U.S. 226 (1990); *Lamb's Chapel, supra; Good News Club, supra*. But if the Tenth Circuit's interpretation of *Hazelwood* stands, *Hazelwood* will become a safe haven for public school officials' suppression of religious expression. As long as school officials can contend that student religious expression occurred within a "school-sponsored" context, they will be free to implement wholesale suppression of religious student speech, justifying their actions by a vague concern that the speech might cause controversy. This holding vitiates that portion of *Mergens* that rejected an Establishment Clause challenge to the Equal Access Act on the basis, *inter alia*, that the Bible Club would be granted access to the school newspaper, yearbook and other activities expressly termed "school-sponsored" under *Hazelwood*. 496 U.S. at 237, 248 (citing *Hazelwood*, 484 U.S. at 271). Thus, school officials in the states comprising the Tenth Circuit have license to restrict religious speech, including associational speech protected by the federal Equal Access Act, because of their fear of violating the Establishment Clause while avoiding the corresponding responsibility to demonstrate that there is some validity to that concern.

CONCLUSION

For the reasons set forth hereinabove, Petitioners respectfully request that this Honorable Court grant their Petition and issue a writ of certiorari to the Tenth Circuit to review the issues raised herein and to resolve the conflict among the Circuits as to the appropriate application of *Hazelwood* to viewpoint-based speech restrictions.

Respectfully submitted,

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November 8, 2002

(2)

Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD A. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE, AND NICOLE M. PETRONE, A MINOR, BY AND THROUGH HER FATHER, RICHARD P. PETRONE,
Petitioners,

V.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION

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November 1, 2002

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DONALD F. FLEMING; DEIDRA A. FLEMING; LISA M. MAURER; BRIAN E. ROHRBOUGH; SUSAN A. PETRONE; RICHARD P. PETRONE, (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend Richard P. Petrone,

Plaintiffs - Appellees,

v.

JEFFERSON COUNTY SCHOOL DISTRICTR-1, a Colorado Quasi-Municipal corporation,

Defendant - Appellant.

No. 01-1512

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

298 F.3d 918; 2002 U.S. App. LEXIS 12779

June 27, 2002, Filed

JUDGES: Before EBEL, HENRY and MURPHY, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant, Jefferson County School District ("the District"), appeals the district court's judgment granting declaratory and injunctive relief to Plaintiffs-Appellees, Donald Fleming et al. The district court entered judgment for the Plaintiffs, holding that the

District's guidelines governing a tile painting project at Columbine High School ("CHS") violated the Plaintiffs' constitutional rights under the Free Speech Clause of the United States Constitution. n1 It issued an injunction ordering the District to (1) provide an opportunity for some of the Plaintiffs to paint the tiles they wished to paint but were precluded from doing so under the guidelines and (2) post Plaintiffs' tiles that were painted but not posted because they did not comply with the guidelines. Our jurisdiction arises under 28 U.S.C. § 1291, and we reverse and remand.

n1 The Plaintiffs brought the case against the District and members of the Jefferson County School Board in their official capacities and against the president of the School Board, Jon DeStefano, individually and in his official capacity under 42 U.S.C. §§ 1983 and 1988 seeking declaratory and injunctive relief and costs and attorneys fees. Plaintiffs alleged violations of (1) the Free Speech Clause of the First Amendment; (2) their free speech rights under both the Colorado Constitution; and (3) the Establishment Clause of the First Amendment. Fleming v. Jefferson County Sch. Dist. No. R-1, 170 F. Supp. 2d 1094, 1096-97 (D. Colo. 2001). The district court granted Plaintiffs judgment on their Free Speech Clause claim, but granted judgment to the District on the other two claims. The district court also granted judgment to members of the School Board and DeStefano. The Plaintiffs have not appealed any of the judgments against them, so only the Free Speech Clause issue is before us.

I. Background

On April 20, 1999, two CHS students, Eric Harris and Dylan

Klebold, entered the school and shot numerous students and teachers. They killed twelve students, including Daniel Rohrbough and Kelly Fleming, and one facultymember before taking their own lives. Upon deciding in the summer of 1999 to reopen the school, the District recognized that the "prospect of reintroducing students to the CHS building posed significant mental health challenges." "School officials made a concerted effort to change the appearance of the building to avoid incorporating sensory cues that could reactivate memories of the attack." School officials also sought ways to reacquaint students with the building. The CHS librarian, Elizabeth Keating, and art teacher, Barbara Hirokawa, proposed a project in which students would create "abstract artwork on 4-inch-by-4-inch tiles" that would be glazed, fired, and installed above the molding throughout the halls of the school. n2 The press release for the project stated that the project would serve "two purposes": "Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be a part of reconstruction of their school."

n2 This abstract art tile project had been initiated two years prior to the summer of 1999, as part of an on going art project in the school's art classes. We refer to the tile painting project after the shooting, subject to the restrictions at issue, as the "tile project" throughout the opinion.

Ms. Keating and Ms. Hirokawa received approval for the expanded tile project from the area administrator, Barbara Monseu, who consulted with other administrators, including persons coordinating mental health efforts. "To assure that the interior of the building would remain a positive learning environment and not

become a memorial to the tragedy, Ms. Monseu directed that there could be no references to the attack, to the date of the attack, April 20, 1999, or 4/20/93 [sic], no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive." Tiles that did not conform to the guidelines were not to be hung. The tiles and supplies to be used in the tile project were paid for by private donations to the Jefferson Foundation and the Columbine Memorial Account. These donation monies were to be used at the discretion of CHS administrators.

During the summer of 1999, the District invited additional members of the affected community to participate in the tile project. In addition to current and incoming students, family members of the victims, rescue workers who responded to the shooting, and health care professionals who treated the injured were invited to paint tiles. The district court found that the purpose of the tile project was to "assist in community healing by allowing the community to 'retake' the school by participating in its restoration." Rescue workers and other community members who responded to the shooting painted tiles at a session in August, and the district court found that "hundreds" of people participated in this session. CHS graduates from 1998-1999, as well as people attending the CHS 1989 reunion, were also allowed to paint tiles. All of the invited participants had some relationship to the school or the shooting.

CHS teachers supervised the tile painting sessions and informed the participants of the guidelines, but did not give them written copies of these guidelines. School officials set up a table at the entrance of the painting area with examples and posters of acceptable tile designs, but did not identify specific symbols that would be prohibited as religious expression.

The Plaintiffs expressed dissatisfaction with the guidelines, and told the CHS instructors supervising the painting that they wished to paint the names of their children and religious symbols on their tiles. These tiles contained messages such as "Jesus Christ is Lord," "4/20/99 Jesus Wept," "There is no peace says the Lord for the wicked," names of victims killed in the shooting, and crosses. The teachers supervising the painting session told some of the Plaintiffs that they could paint the tiles as they wished, but "informed them that tiles that were inconsistent with the guidelines would be fired separately and would not be affixed to the walls, but would be given to them for their personal use."

The tiles were to be screened for compliance with the guidelines before they were sent to be fired and glazed, but due to the volume of tiles, some that were inconsistent with the guidelines escaped review. In addition to screening the tiles prior to firing them, CHS teachers instructed parent volunteers affixing the tiles to the walls not to post tiles that did not comport with the guidelines. If the volunteers had questions about whether a tile was appropriate, they were told to put it to the side. Ms. Monseu inspected the building after the tiles were affixed and noticed that some inappropriate tiles had been posted. The tiles were reviewed again, and approximately eighty to ninety tiles that were inconsistent with the guidelines were removed, out of a total of 2,100 tiles that had been put on the walls. These tiles included ones with crosses, gang graffiti, an anarchy symbol, a "Jewish star," angels, the blue Columbine ribbon, a skull dripping with blood, the art teacher's name on the tile she painted, the date 4-20, and a mural containing red colors that were disturbing to some people.

A meeting was held in early September with the Plaintiffs and families of the victims, during which Ms. Monseu relaxed the

restrictions that had previously been imposed, telling them that they could paint tiles with their children's names and initials, dates other than 4-20, and the Columbine ribbon, but that they could not paint religious symbols, the date of the shooting, or anything obscene or offensive. None of the Plaintiffs went to the school to repaint any tiles after this change of policy because "they had made their expressions previously or been denied the opportunity to paint the tiles they wanted to paint." Plaintiffs then brought this suit under 42 U.S.C. §§1983 and 1988 for an alleged violation of their free speech rights and the Establishment Clause. n3 The district court granted judgment for the Plaintiffs on their free speech claim under the United States Constitution, and the District brought this appeal.

n3 With the initiation of this suit, District officials "froze" the tile project. There are approximately a thousand tiles that have been painted, but have not been evaluated by the District for compliance with the guidelines or posted on the walls.

II. Discussion

A. Standard of Review

In cases involving activity that may be protected under the Free Speech Clause, "an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Lytle v. City of Haysville, 138 F.3d 857, 862 (10th Cir. 1998) (internal quotation marks omitted). The district court's findings of constitutional fact are reviewed de novo, as are its ultimate conclusions of constitutional law. Revo v. Disciplinary Bd. of the Sup. Ct. for the State of N.M., 106 F.3d

929, 932 (10th Cir. 1997). Other factual findings, however, are reviewed for clear error. Brown v. Palmer, 915 F.2d 1435, 1441 (10th Cir. 1990), aff'd on reh'g, 944 F.2d 732 (10th Cir. 1991) (en banc).

We reject Appellees' assertion that our standard of review on issues of First Amendment protected speech depends on which party prevailed below. They assert that because the purpose of an independent examination "is to restrain government power from unlawful restrictions on free speech," such an independent review is not necessary in this case because "the trial judge protected the free speech rights of the [Plaintiffs]." This argument misunderstands the reasoning of an independent review. It is the issue, the constitutional freedom of speech, that triggers an independent examination of the record, not the outcome below. "As with other fact-intensive, mixed questions of constitutional law, ... 'independent review is ... necessary ... to maintain control of, and to clarify, the legal principles' governing the factual circumstances necessary to satisfy the protections of the Bill of Rights." Lilly v. Virginia, 527 U.S. 116, 136, 144 L. Ed. 2d 117, 119 S. Ct. 1887 (1999) (quoting Ornelas v. United States, 517 U.S. 690, 697, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996)). Further, this court previously has conducted an independent review of the record in First Amendment cases where the government appeals the district court decision below. See Revo, 106 F.3d at 932; Melton v. City of Okla. City, 928 F.2d 920, 927 (10th Cir. 1991) (en banc); Brown, 915 F.2d at 1441.

B. Analysis

The district court held that the tiles at issue constituted neither government speech, nor "school-sponsored" speech, but were private speech in a limited public forum. It found that the District's guidelines prohibiting the date of the shooting was not reasonable in light of the tile project's purpose, and that the prohibition on religious symbols was not viewpoint neutral. We disagree with the district court that the tile project is not "school-sponsored" speech as defined by Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988).

1. Speech in School Setting

We begin by recognizing that there are three main categories of speech that occur within the school setting. Student speech that "happens to occur on the school premises" is governed by Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 21 L. Ed. 2d 731, 89 S. Ct. 733, 49 Ohio Op. 2d 222 (1969). n4 Hazelwood, 484 U.S. at 271. The black armbands worn by the students in Tinker are representative of the pure student expression that a school must tolerate unless it can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities." Tinker, 393 U.S. at 514.

n4 "Vulgar," "lewd," and "plainly offensive" student speech is governed by Bethel School District No. 403 v. Fraser, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986), as opposed to Tinker. Hazelwood, 484 U.S. at 271 n.4. The tiles in this case do not fall into this category. Because the critical issue in this case is whether the speech is student

speech, school-sponsored speech, or government speech, we have focused our analysis on these three categories of speech in the school setting.

At the opposite end of the spectrum is government speech, such as the principal speaking at a school assembly. When the government speaks, it may choose what to say and what not to say. Wells v. City & County of Denver, 257 F.3d 1132, 1144 (10th Cir. 2001) ("'The First Amendment does not preclude the government from exercising editorial control over its own medium of expression.'" (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc)), cert. denied, Wells v. City & County of Denver, 151 L. Ed. 2d 384, 122 S. Ct. 469 (2001). To discern whether expression is government speech, we apply the four factor analysis articulated in Wells: (1) whether the "central purpose" of the project is to promote the views of the government or of the private speaker; (2) whether the government exercised "editorial control" over the content of the speech; (3) whether the government was the "literal speaker"; and (4) whether "ultimate responsibility" for the project rested with the government. 257 F.3d at 1141.

Between pure student speech and government speech is "school-sponsored" speech, which is governed by Hazelwood. School-sponsored speech is student speech that a school "affirmatively ... promotes," as opposed to speech that it "tolerates." Hazelwood, 484 U.S. at 270-71. "Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" constitute school-sponsored speech, over which the school may exercise editorial control, "so long as [its] actions are reasonably related to legitimate pedagogical concerns." Id. at 271, 273. We believe that

the tile project at CHS constitutes school-sponsored speech and is therefore governed by Hazelwood.

2. Hazelwood

At issue in Hazelwood was a high school principal's excision of two pages of a student newspaper containing articles on teen pregnancy and the impact of divorce on students at the school. The newspaper, Spectrum, was produced by the school's journalism class, funded with Board of Education funds, and supervised by a faculty sponsor. The faculty advisor "was the final authority with respect to almost every aspect of the production and publication" of Spectrum, including its content, and every issue was reviewed by the principal prior to publication. Id. at 268-69 (internal quotation marks omitted).

In Hazelwood, the Court began by determining whether the newspaper could be characterized as a public forum. Because public schools do not possess the attributes of traditional public forums, the Court found that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." Id. at 267 (internal citations omitted) (quoting Perry Educ. Ass'n v Perry Local Educators' Ass'n, 460 U.S. 37, 47, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)). If, instead, the facilities have "been reserved for some other intended purpose, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community." Id. (quoting Perry Educ. Ass'n, 460 U.S. at 46 n.7). The Court found that the school had not opened up Spectrum for

"'indiscriminate use'" by student reporters or the student body generally, and instead, that it had "'reserved the forum for its intended purpose,'" a supervised learning experience for journalism students. 484 U.S. at 270 (quoting Perry Educ. Ass'n, 460 U.S. at 47, 46). Accordingly, school officials could regulate the contents of Spectrum in "any reasonable manner." Id.

The district court read Hazelwood as only applying "to activities conducted as part of the school curriculum." Fleming, 170 F. Supp. 2d at 1108. We believe this reading of Hazelwood is too narrow. We read the Court's definition of "school-sponsored" speech to mean activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns.

In Hazelwood, the Court drew a crucial distinction between a school's toleration of student speech that "happens to occur on the school premises," and student speech that a school "affirmatively ... promotes." 484 U.S. at 270-71. As opposed to the pure student speech in Tinker, the Court held that a different standard applied for determining "when a school may refuse to lend its name and resources to the dissemination of student expression." 484 U.S. at 272-73. Two critical concerns drove the Court in articulating the standard for school-sponsored speech: the imprimatur and pedagogical interests of the school. If the speech at issue bears the imprimatur of the school and involves pedagogical interests, then it is school-sponsored speech, and the school may impose restrictions on it so long as those restrictions are reasonably related to legitimate pedagogical concerns.

The imprimatur concept covers speech that is so closely connected to the school that it appears the school is somehow sponsoring the speech. Expressive activities that do not bear the

imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings. See generally, Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 S. Ct. 2093, 2098, 150 L. Ed. 2d 151 (2001) (involving a Christian children's club after-school meetings). In contrast, expressive activities that the school allows to be integrated permanently into the school environment and that students pass by during the school day come much closer to reasonably bearing the imprimatur of the school. Cf. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 968 (9th Cir. 1999) (validating the concern that students would be a "captive audience" to speech posted on the fence of a school's baseball field).

Further, the level of involvement of school officials in organizing and supervising an event affects whether that activity bears the school's imprimatur. See Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 828-29 (9th Cir. 1991) (en banc) (finding that because school officials exercised "editorial control" over and had to "specifically approve" the speech at issue, that members of the public would likely perceive the speech "'to bear the imprimatur of the school'"); Poling v. Murphy, 872 F.2d 757, 762 (6th Cir. 1989) (finding there was "no doubt" that a student election and election assembly were "'school-sponsored'" where the school scheduled the assembly during school-hours on school property, "made attendance compulsory," "determined the eligibility of prospective speakers," provided the voting machines, and "vetted [the candidates'] speeches in advance").

The Court in Hazelwood also recognized the school's pedagogical interests. Pedagogical means related to learning, and, like the Hazelwood Court, we give substantial deference to

educators' stated pedagogical concerns. The Court recognized that its articulated standard for school-sponsored expression was "consistent with [its] oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Hazelwood, 484 U.S. at 273. n5

> n5 This court has also recognized our limited role as federal judges in reviewing school decisions. See West v. Derby Unified Sch. Dist., 206 F.3d 1358, 1363 (10th Cir. 2000) ("We reaffirm the principle that 'judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... By and large, public education in our Nation is committed to the control of state and local authorities.'") (quoting Epperson v. Arkansas, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968)), cert. denied, West v. Derby Unified Sch. Dist., 531 U.S. 825, 121 S. Ct. 71, 148 L. Ed. 2d 35 (2000); Miles v. Denver Pub. Sch., 944 F.2d 773, 779 (10th Cir. 1991) ("We will protect appropriate constitutional interests. We should not and will not run the schools.").

We think that the Court's language that activities are "school-sponsored" speech if they are "designed to impart particular knowledge or skills to student participants and audiences," 484 U.S. at 271, means activities that affect learning, or in other words, affect pedagogical concerns. "The universe of legitimate pedagogical concerns is by no means confined to the academic .... [for it includes] discipline, courtesy, and respect for authority." Poling, 872 F.2d at 762. Many cases have applied a Hazelwood analysis to activities outside the traditional classroom where, so long

as the imprimatur test is satisfied, the pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment. See Brody v. Spang, 957 F.2d 1108, 1122 (3d Cir. 1992) (commencement exercises and stating that avoidance of controversy is a valid pedagogical purpose); Planned Parenthood, 941 F.2d at 828 (upholding the school's purpose in avoiding controversial topics in advertisements contained in programs distributed at athletic events); Crosby v. Holsinger, 852 F.2d 801, 802 (4th Cir. 1988) (finding school had a valid pedagogical concern in avoiding a school mascot that was controversial to a segment of the school population); Lundberg v. West Monona. Cmty. Sch. Dist., 731 F. Supp. 331, 338-39 (N.D. Iowa 1989) (concluding school had valid educational purpose in avoiding religious controversy by banning prayer at commencement exercises); David L. Dagley, Trends in Judicial Analysis Since Hazelwood: Expressive Rights in the Public Schools, 123 Ed. Law Rep. 1, 9 (1998) ("In Hazelwood, curriculum became anything that might be perceived as bearing the sponsorship of the school."); Bruce C. Hafen, Comment, Hazelwood School District and the Role of First Amendment Institutions, 1988 Duke L.J. 685, 693-94 (1988) (stating that an education-related activity is one supervised by a faculty member and designed to impart knowledge and skills to students "or an activity that 'students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.'" (emphasis added) (quoting Hazelwood, 484 U.S. at 271)). Indeed, the pedagogical concern in Hazelwood itself was to avoid the controversial subjects of pregnancy and divorce in a school setting because of the potentially disruptive nature of such subjects upon young students.

Under Hazelwood, educators may exercise control over school-sponsored speech so long as their actions are "reasonably

related to legitimate pedagogical concerns." 484 U.S. at 273. The Court recognized educators' need to consider "the emotional maturity of the intended audience" when disseminating student speech on "potentially sensitive topics," as well as the school's prerogative to not "associate [itself] with any position other than neutrality on matters of political controversy." Id. at 272.

Finally, we conclude that Hazelwood allows educators to make viewpoint-based decisions about school-sponsored speech. If Hazelwood required viewpoint neutrality, then it would essentially provide the same analysis as under a traditional nonpublic forum case: the restriction must be reasonable in light of its purpose (a legitimate pedagogical concern) and must be viewpoint neutral. See Hawkins v. City & County of Denver, 170 F.3d 1281, 1287 (10th Cir. 1999). In light of the Court's emphasis on the "special characteristics of the school environment," Hazelwood, 484 U.S. at 266 (internal quotation marks omitted), and the deference to be accorded to school administrators about pedagogical interests, it would make no sense to assume that Hazelwood did nothing more than simply repeat the traditional nonpublic forum analysis in school cases.

Our sister circuits have split over whether Hazelwood requires that schools' restrictions on school-sponsored speech be viewpoint neutral. Most recently, the Third Circuit expressed its view that Hazelwood does not require viewpoint neutrality of school districts. "Hazelwood clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored activities so long as those restrictions are reasonably related to legitimate pedagogical concerns." C.H. ex rel. Z. H. v. Oliva, 195 F.3d 167, 172-73 (3d Cir. 1999), aff'd on other grounds, n6 C.H. ex rel. Z. H. v. Oliva, 226 F.3d 198 (3d

Cir. 2000) (en banc), cert. denied, Hood v. Milford Township Bd. of Educ., 533 U.S. 915, 121 S. Ct. 2519, 150 L. Ed. 2d 692 (2001). The C.H. court reasoned that

> the requirement of viewpoint neutrality, while essential to the analysis of a school's restrictions on extracurricular speech, such as that at issue in Rosenburger and Lamb's Chapel, is simply not applicable to restrictions on the State's own speech. Under Hazelwood, "educators are entitled to exercise greater control over student expression when it is elicited as part of a teacher-supervised, school-sponsored activity. In that specific environment, viewpoint neutrality is neither necessary nor appropriate, as the school is there responsible for determining the content of the education it provides.

195 F.3d at 173 (internal citations, quotation marks, ellipses, and alterations omitted). The First Circuit reached a similar conclusion in Ward v. Hickey. 996 F.2d 448, 454 (1st Cir. 1993) ("The Court in [Hazelwood] did not require that school regulation of school-sponsored speech be viewpoint neutral.").

> n6 Upon rehearing en banc, an equally divided Third Circuit affirmed the district court's ruling on procedural grounds, dismissing some claims for want of jurisdiction, and remanding to give plaintiff an opportunity to cure the deficiencies in her complaint. C.H. ex rel. Z.H. v. Oliva, 226 F.3d at 200-01. The en banc panel "declined to address the tendered constitutional issue under these circumstances." Id. at 203.
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> On the other side of the debate, the Ninth Circuit in Planned

Parenthood held that Hazelwood required viewpoint neutrality. Planned Parenthood, 941 F.2d at 829 (requiring viewpoint neutrality but holding that the school district was viewpoint neutral in prohibiting all advertisements in school sponsored publications addressing the subject of birth control). A subsequent panel of that Circuit, however, recently has criticized that holding. Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003 (9th Cir. 2000), cert. denied, Downs v. Los Angeles Unified Sch. Dist., 532 U.S. 994, 149 L. Ed. 2d 636, 121 S. Ct. 1653 (2001). "Despite the absence of express 'viewpoint neutrality' discussion anywhere in Hazelwood, the Planned Parenthood court incorporated 'viewpoint neutrality' analysis into nonpublic forum, school-sponsored speech cases in our Circuit." 228 F.3d at 1010. The Downs court found itself "compelled by Planned Parenthood" to view the school's restrictions on speech "through a viewpoint neutrality microscope" if it found that the speech at issue was school-sponsored. n7 228 F.3d at 1011.

> n7 In Downs, a teacher wanted to post messages contrary to the school's message of tolerance on a bulletin board that the school had designated for Gay and Lesbian Awareness Month. 228 F.3d at 1005-07. The teacher contended that the school impinged upon his free speech rights when it refused to allow him to post the messages. See id. at 1005. The Downs court upheld the school's restrictions, finding that the speech posted on the bulletin board was government speech, and therefore not governed by Hazelwood. Id. at 1011.

A divided panel of the Sixth Circuit in Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), stated, without discussion, that the Hazelwood Court "noted" that non-viewpoint-based restrictions

were part of its analysis. Id. at 727, rev'd and remanded on other grounds, 236 F.3d 342 (6th Cir. 2001) (en banc). Upon rehearing en banc, the Sixth Circuit held that the previous panel had erred in applying Hazelwood to the case of a university newspaper, and found that the newspaper was not a nonpublic forum, but instead was subject to the stricter standards of a designated public forum. Kincaid, 236 F.3d at 346 & n.5. Because the Kincaid panel opinion was reversed, it does not offer us much persuasive value.

Finally, the Eleventh Circuit has expressed doubts that the Hazelwood Court intended to "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views," Searcey v. Harris, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989), and stated it would "continue to require school officials to make decisions relating to speech which are viewpoint neutral." Id. at 1325. Such a conclusion seems contrary to the emphasis that the Hazelwood Court placed on the uniqueness of the public school setting and the deference with which it viewed decisions made by educators.

We find the Third Circuit's opinion in C.H. to be persuasive and hold that Hazelwood does not require educators' restrictions on school-sponsored speech to be viewpoint neutral. Starting with Hazelwood itself, the case makes no mention that the school's restriction must be neutral with respect to viewpoint, although the Court had already decided Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985), which stated that government restrictions in a nonpublic forum must not discriminate based on viewpoint. Id. at 806. Second, the Court's specific reasons supporting greater control over school-sponsored speech, such as determining the appropriateness of the message, the sensitivity of the issue, and with

which messages a school chooses to associate itself, often will turn on viewpoint-based judgments. "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order,' or to associate the school with any position other than neutrality on matters of political controversy." n8 Hazelwood, 484 U.S. at 272 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)) (internal citations omitted). No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint. Hazelwood entrusts to educators these decisions that require judgments based on viewpoint. n9

n8 Whether one reads this sentence as granting a school "the authority ... to associate itself with any position other than neutrality," or "the authority to refuse ... to associate itself with any position other than neutrality" on controversial subjects, the import remains the same – a school must "retain the authority" to decide with which positions it will associate itself.

n9 Although we have never addressed this issue directly, our previous opinion in Miles suggests Hazelwood does not require viewpoint neutrality. Miles v. Denver Pub. Sch., 944 F.2d 773 (10th Cir. 1991). After classifying the speech at issue as "school-sponsored" and finding that the school had asserted legitimate pedagogical interests supporting its restriction of the speech, the Miles court stated that "the only remaining question under Hazelwood is whether the actions taken by the school are reasonably

related to legitimate pedagogical interests." Id. at 778 (emphasis added). We never suggested that viewpoint neutrality enters into the analysis.

Given the types of decisions that the Hazelwood Court recognized face educators in "'awakening the child to cultural values'" and promoting conduct consistent with "'the shared values of a civilized social order,'" we join our sister circuits that have concluded Hazelwood does not require viewpoint neutrality. Hazelwood, 484 U.S. at 272 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493, 98 L. Ed. 873, 74 S. Ct. 686, 53 Ohio Op. 326 (1954), and Fraser, 478 U.S. at 683).

3. Application of Hazelwood

We now turn to applying Hazelwood to the facts of this case. We begin by asking whether the tile project constituted a public forum. See Miles, 944 F.2d at 776. The Supreme Court has recognized three distinct categories of government property: "(1) traditional public fora; (2) designated public fora; and (3) nonpublic fora." Hawkins, 170 F.3d at 1286. The parties concede that the tile project does not constitute a traditional public forum or a designated public forum, and our review of the record comports with this analysis. n10 As recognized by the Court in Hazelwood, "public schools do not possess all of the attributes of streets, parks, and other traditional public forum that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" 484 U.S. at 267 (quoting Hague v. CIO, 307 U.S. 496, 515, 83 L. Ed. 1423, 59 S. Ct. 954 (1939)). Nor do we believe that the tile project constitutes a designated public forum, as the District has not "'by policy or practice'" opened the tile project "'for indiscriminate use by the

general public,' or by some segment of the public, such as student organizations." Hazelwood, 484 U.S. 260, 267, 98 L. Ed. 2d 592, 108 S. Ct. 562 (internal citations omitted) (quoting Perry Educ. Ass'n, 460 U.S. at 47). From the tile project's inception after the shooting, the District created and enforced restrictions on what participants were allowed to paint, supervised the painting sessions, and screened out inappropriate tiles. By showing this "affirmative intent to retain editorial control and responsibility over" the tile project, the District demonstrated that it had not opened the tile project to indiscriminate use by the participants. Planned Parenthood, 941 F.2d at 824. See, e.g., Hawkins, 170 F.3d at 1288 (finding nonpublic forum where city allowed limited speech on property but consistently enforced restrictions on leafletting and picketing). Instead, the District reserved the tile project "for its intended purpose," Hazelwood, 484 U.S. at 270 (alteration and internal quotation marks omitted), which was allowing participants to take part in a reconstruction of the school. The level of control that the District retained over the tile project fails to reveal the "clear intent to create a public forum" that Hazelwood requires. Id. at 270. We therefore conclude that the tile project was a nonpublic forum and turn to whether the tile project constitutes school-sponsored speech.

n10 Appellees contend that the tile project is a "limited public forum," which they acknowledge has recently been analyzed under a nonpublic forum rubric. See Summum v. Callaghan, 130 F.3d 906, 914-15 (10th Cir. 1997) ("In more recent cases, however, the Court has used the term 'limited public forum' to describe a type of nonpublic forum and has applied a reasonableness standard," wherein the government may restrict speech "so long as the distinctions drawn are reasonable in light of the purpose served by the

forum and are viewpoint neutral.") (internal citations and internal quotation marks omitted). They argue that the District's restrictions were unreasonable and impermissibly discriminatory based on viewpoint, which is generally prohibited even in a nonpublic forum. See Ark. Educ. Television Comm'n. v. Forbes, 523 U.S. 666, 677-78, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998). Thus, their central point on appeal is that the tile project should be analyzed under the traditional nonpublic forum analysis, because they believe it does not constitute school-sponsored speech under Hazelwood, or in the alternative, that even under a Hazelwood analysis, the District's restrictions were not reasonably related to legitimate pedagogical concerns.

a. Imprimatur

The tiles at issue in this case will become a lasting part of the school. The presence of permanently affixed tiles on the walls implicates the school's approval of those tiles. When coupled with organizing, supervising, approving the funding, and screening the tiles, the school's decision permanently to mount them on the walls conveys a level of approval of the message. If a tile advocating racial hatred or sexual bigotry or encouraging the use of illicit drugs were affixed to the walls, community members rightly might protest that the school implicitly, if not explicitly, promoted such values and conduct. When a tile, created pursuant to a project that the school supervised, and for which it approved funding, is displayed permanently on school grounds, and when that project aims to advance pedagogical concerns, the tile will normally be considered school-sponsored speech.

In concluding that the tiles do not bear the imprimatur of the school, the district court noted that a reasonable observer, charged with the history and context in which the display appears, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779-81, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995) (O'Connor, J., concurring), "would be aware through the press releases and extensive media coverage of the events surrounding the shootings that CHS invited members of the Columbine community in to paint the tiles as part of the healing process, and that the tiles were not painted by or endorsed by CHS or the School District." Fleming, 170 F. Supp. 2d at 1110. No doubt the variety and number of tiles would lead an observer to understand that the school itself did not paint the tiles. However, the observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the tiles it allowed to become a part of the school itself, which in this case, it did.

The level of school involvement over the tile project also belies a conclusion that the tiles did not bear the imprimatur of the school. Although the district court characterized the school's input as "limited," it made factual findings that the District invited participants to take part in the painting sessions, held the tile painting sessions at CHS, had faculty members supervise the sessions, informed the participants "generally of the guidelines for tile content," set up a table at the entrance with "examples and posters of acceptable tile designs," allocated the funds for the tile project out of the private fund which was "to be used at the discretion of the principal," tried to screen and pull tiles inconsistent with the guidelines before they were sent to be fired, organized parent volunteers to affix the tiles and gave them instructions regarding inappropriate subject matter, and evaluated and removed inappropriate tiles that had fallen through the screening process. This level of involvement varies

greatly from the school cases involving extracurricular activities, such as Good News Club, where the school did not call the meetings, invite participants, set the agenda, approve funding, or supervise the meetings. Although the painting activity took place outside of school hours and was not mandatory, the effects of the painting are visible on the school walls throughout the building, during the school day when children are compelled to attend.

Finally, in arguing that the tile project was not school-sponsored, the Plaintiffs rely heavily on Ms. Monseu's statement in her deposition saying that "this is a project outside of the school, this is a separate project, but we're trying to keep track of what's going on, not necessarily control everything, but keep track of what's going on." n11 We are obligated to examine the record as a whole, however, and evaluate what the school actually did, as opposed to carving out an isolated statement from the record. Because the school permanently integrated the tiles into the school environment, and was significantly involved in the creation, funding, supervision, and screening process of the tile project, we conclude that the tiles bear the imprimatur of the school.

n11 In any event, this is a fairly ambiguous statement. This statement may convey nothing more than the obvious--that the project involved painting sessions outside of school hours, in which selected non-students (but nevertheless individuals with a connection to the tragedy of the shootings) could participate, and the school did not mandate what must be painted (as opposed to controlling those things that could not be painted). That statement does not sufficiently disengage the school so as to avoid the school's imprimatur on the project.

b. Pedagogical Concerns

We also find that the goal of the tile project, allowing participants to take part in the reconstruction of the school, involves the type of pedagogical interests with which Hazelwood was concerned. The purpose of reacquainting the students with the school and participating in community healing falls under the broad umbrella that courts have given to pedagogical purposes. For instance, one court has instructed that school-sponsored activities under Hazelwood "need not occur in a traditional classroom setting," Henerey v. City of St. Charles, 200 F.3d 1128, 1133 (8th Cir. 1999) (internal quotation marks omitted), and pedagogical purposes such as teaching civility, learning leadership skills, and exposing students to the democratic process have been found to satisfy this component of Hazelwood. See id. (finding school elections are pedagogical); Poling, 872 F.2d at 762 (6th Cir. 1988) (same). Further, the environment in which learning takes place, such as the school's hallways, can be a pedagogical concern, as it affects the learning process. n12

n12 At oral argument, counsel for the Appellees agreed that pervasive tiles throughout the school hallways touched upon a pedagogical concern. Judge Murphy questioned counsel about the school's pedagogical interest in controlling the appearance of the hallways, asking "But [the tile project] is pervasive in the sense that it is throughout the school .... And doesn't that reflect upon the pedagogical interests?" Appellees' counsel responded, "It, it does reflect upon pedagogical interests. I mean what [school officials] want the school to look like is certainly their business." (Oral Arg., 2/1/02, James R. Rouse, Sr..)

We do not think that the involvement of community members in the tile project makes it any less of a school-sponsored event. The pedagogical concerns recognized in Hazelwood, such as the emotional maturity of the audience and the sensitivity of the topic, focus on who is listening, rather than who is speaking. Hazelwood, 484 U.S. at 271-72. The Ninth Circuit also recognized in Planned Parenthood that even though the speech at issue was from an outside entity, rather than a student, the Hazelwood analysis did not change. 941 F.2d at 827.

> The publication is the same and the audience is the same, whether the source for the speech is from inside the school or outside, is paid or free. The school has the same pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is.

Id. (emphasis added).

The District's recognition that the school is part of a larger community, here including parents and rescue workers who responded to the shooting, does not make the tile project's purpose less of a pedagogical one. That is, so long as a pedagogical purpose is present, we do not believe that the existence of broader and consistent objectives, such as community involvement, should result in the loss of the proper pedagogical purpose. Indeed, many school-sponsored events include the participation of outside persons, whether it be a guest speaker, artist, or musician. Just because a school has invited these people into the school to participate in an event, such as a debate or panel discussion, should not mean that the school loses control of the message that is

conveyed to the students.

c. Reasonably Related to Legitimate Pedagogical Concerns

In creating the guidelines for the tile project, the District had two main pedagogical concerns in mind: (1) it wanted to ensure that the interior of the building remained a positive learning environment and not become a memorial to the tragedy (Ord., ¶ F-22), and (2) it wanted to avoid divisiveness and disruption from unrestrained religious debate on the walls. n13 Jon DeStefano, the school board president ultimately responsible for the board's general policy prohibiting religious symbols to be affixed permanently to school walls, testified that if the school allowed some religious symbols to be posted, it would open the door to all types of sentiments, including inflammatory ones, such as Nazi symbols. To the District, it was not just a question of permitting various mainstream religious symbols, but of "opening all kinds of other doors" by doing so. n14

n13 The District forecast that without the religious restriction, the walls could become a "situs of disruption, debate, and controversy that totally overwhelms and displaces the educational function of the building."

n14 As pointed out at oral argument, under a traditional nonpublic forum analysis, which the Appellees urged as the appropriate analysis for the tile project, by allowing a tile stating "God is Love," the District would be obligated to post tiles stating "God is Hate."

Because the district court did not find the tile project to be "school-sponsored" speech under Hazelwood, it did not address whether the District's restrictions were reasonably related to these

legitimate pedagogical concerns, but instead evaluated them under a limited forum analysis. The District ultimately relaxed the tile restrictions for the Plaintiffs, continuing to maintain only the prohibitions on the date of the shooting, religious symbols, and anything obscene or offensive. Only the first two of these restrictions were before the district court, and thus, those are the two restrictions we now address, measuring them against the District's legitimate pedagogical concerns.

The district court characterized the school's restriction on the date of the shooting as unreasonable because the District allowed the Plaintiffs to paint the name or initials of their child on the tiles, which would act as a reminder of the shooting as much as the date 4/20/99 would. We disagree. In weighing the competing interests of accommodating the victims' parents and preventing the tile project from becoming a memorial to the shooting, the District struck a reasonable balance. The Hazelwood standard does not require that the guidelines be "the most reasonable or the only reasonable limitation[s]," only that they be reasonable. Hawkins, 170 F.3d at 1287 (internal quotation marks omitted).

The fact that there are other references to the shooting in the school also does not render the District's restrictions on the tile project unreasonable. Those materials, which consisted primarily of a display case near the library, plaques and posters in the "administrative offices and/or other places inside CHS," and a sandstone memorial near the baseball field, constitute clear government speech. As an initial matter, this court has recognized that the government's own speech does not grant access to the public to speak on those topics. "If the government's own speech could be used to support a claim that it had thereby caused its facilities to become a public forum, then display cases in public

hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." Brown v. Palmer, 944 F.2d 732, 738 (10th Cir. 1991) (en banc) (internal citations omitted), aff'g 915 F.2d 1455 (10th Cir. 1990).

We perceive two main differences between the school's speech and the tile project, leading us to conclude that the presence of these memorials does not render the District's tile project restriction unreasonable. First, the tile project involves speech that is pervasive throughout the school. As opposed to isolated plaques in the office, or near the library, these tiles line the school halls, so that students constantly view them on their way to class. Second, the school retains control over the tone and manner of delivery of the speech that it chooses to display in the building. Aided by the advice of psychologists about how best to deal with the shooting, school officials could craft tasteful and appropriate memorials to the victims. The school retained control over the parameters of this speech, as opposed to allowing student responses, which could be more inflammatory or judgmental. We think it is reasonable for the District to place a few memorials in the school without having to allow unconstrained, controversial student debate about the shooting throughout the hallways.

We also believe the District's restriction on religious symbols was reasonably related to a pedagogical interest. If the District had advanced only the purely legal reason of avoiding Establishment Clause liability as justifications for the restrictions on the tiles, then we would not give Hazelwood deference to that reasoning. Roberts v. Madigan, 921 F.2d 1047, 1057 n.10 (10th Cir. 1990). Because this court is "well-equipped" to evaluate constitutional reasons, we

do not accord school districts asserting those reasons "the same deference as in other cases involving issues that school officials are uniquely qualified to handle." Id.

In this case, however, the District asserted two pedagogical reasons for its restriction on religious references: (1) religious references may serve as a reminder of the shooting, and (2) to prevent the walls from becoming a situs for religious debate, which would be disruptive to the learning environment. n15 We do not need to address the first reason because we find the latter of these to be reasonably related to the restriction on all religious symbols. n16

n15 The District expressed a desire to avoid a "controversy that totally overwhelms and displaces the educational function of the school building."

n16 The district court specifically did not analyze whether this restriction was reasonable in light of the pedagogical reasons asserted, because it found that the restriction was not viewpoint neutral. Fleming, 170 F. Supp. 2d at 1113 n.5.

Two courts recently have recognized a school's legitimate interest in avoiding religious controversy and disruption resulting from the posting of religious speech. In DiLoreto, the Ninth Circuit found the school district's decision to exclude advertisements on a baseball field fence "on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy." 196 F.3d at 969. The DiLoreto court found that because students were a "captive audience" at classes and school-sponsored events, the district's desire to avoid "controversy

and distraction created by political and religious messages" on the fence was reasonable. Id. at 968. The court also noted the school district's concern that posting the religious speech, "would force [it] to open the forum to all expressions of personal beliefs." Id. The Seventh Circuit in Gernetzke v. Kenosha Unified School District No. 1, 274 F.3d 464 (7th Cir. 2001), recognized similar concerns, upholding a principal's decision prohibiting a religious group's posting of a cross because he feared that allowing the cross "might also require him to approve murals of a Satanic or neo-Nazi character, which would cause an uproar." Id. at 466. Like these courts, we believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls.

III. Conclusion

We conclude by noting that the Hazelwood analysis does not give schools unbridled discretion over school-sponsored speech. A number of constitutional restraints continue to operate on public schools' actions, such as the Establishment Clause, the Free Exercise Clause, the Equal Protection Clause, and substantive due process. In this case, the wisdom of the Supreme Court in Hazelwood of fashioning a separate analysis for school sponsored speech is obvious. If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as "God is Hate," once it allows tiles that say "God is Love." When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby limiting speech instead of increasing it. n17 The District could be forced to provide an opportunity for potentially thousands of participants to repaint their tiles without any meaningful restrictions by the District, leading to a potentially disruptive

atmosphere in which to try to educate the students of Columbine High School.

> n17 See generally Ark. Educ. Television Comm'n, 523 U.S. at 681-82 (stating that when institutions are forced to choose between "a cacophony on one the hand, and First Amendment liability, on the other," such a choice "does not promote speech but represses it").

We REVERSE the judgment of the district court on the Plaintiffs' claim under the Free Speech Clause of the First Amendment, and find that the District's restrictions on the tile project were reasonably related to legitimate pedagogical concerns. Therefore, we VACATE the district court's injunction ordering the District to (1) provide an opportunity for the Flemings to paint the tiles they wished to paint but were precluded from painting and (2) mount the tiles painted by the Petrones and Rohrboughs. We REMAND this case for further proceedings consistent with this opinion.

B1

DONALD F. FLEMING; DIEDRA A. FLEMING; LISA M. MAURER; BRIAN E. ROHRBOUGH; SUSAN A. PETRONE; RICHARD P. PETRONE, (individually); and NICOLE M. PETRONE, a minor child, by and through her father and next friend Richard P. Petrone,

Plaintiffs-Appellees,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1, a Colorado Quasi-Municipal corporation,

Defendant-Appellant.

No. 01-1512

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

2002 U.S. App. LEXIS 16620

August 16, 2002, Decided

Amended Opinion of June 27, 2002

JUDGES: Before EBEL, HENRY, and MURPHY, Circuit Judges.

ORDER

Appellant's petition for rehearing is denied. The suggestion for

rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no member in regular active service on the court requested that the court be polled, the suggestion is also denied.

The court determined, however that the opinion issued on June 27, 2002, should be amended as follows:

1. The second sentence in the second paragraph on page 17 should read: Most recently, a panel of the Third Circuit expressed its view that Hazelwood does not require viewpoint neutrality of school districts.

2. The citation at the bottom of page 17 and the beginning of the next sentence should read: C.H. ex rel. Z.H. v. Oliva, 195 F.3d 167, 172-73 (3d Cir. 1999), vacated for en banc review, C.H. ex rel. Z.H. v. Oliva, 197 F.3d 63 (3d Cir. 1999) (en banc). The C.H. panel reasoned that

3. The citation in footnote 6 on page 17 should read: C.H. ex rel. Z.H. v. Oliva, 226 F.3d 198, 200-01, (3d Cir. 2000) (en banc), cert. denied, Hood v. Milford Township Bd. of Education, 533 U.S. 915, 121 S. Ct. 2519, 150 L. Ed. 2d 692 (2001).

4. The first sentence in the first full paragraph on page 20 should read: We find the reasoning in C.H. to be persuasive and hold that Hazelwood does not require educators' restrictions on school-sponsored speech to be viewpoint neutral.

5. The first sentence in the first full paragraph on page 21 should

read: Given the types of decisions that the Hazelwood Court recognized face educators in "'awakening the child to cultural values'" and promoting conduct consistent with "'the shared values of a civilized social order,'" we conclude that Hazelwood does not require viewpoint neutrality.

The opinion is otherwise unchanged.

C1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 99-D-1932

DONALD F. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE, (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend, Richard P. Petrone,

Plaintiffs,

v.

JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a Colorado Quasi-Municipal Corporation, and JON DeSTAFANO, individually and in his official capacity; TORI MERRITS, individually and in her official capacity; DAVID R. DiGIACOMO, individually and in his official capacity; DEBBY OBERBECK, individually and in her official capacity; VINCE CHOWDHURY, individually and in his official capacity.

Defendants.

JUDGMENT

Pursuant to and in accordance with the Order filed on December 22, 2000 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that Defendants Vince Chowdhury, individually and in his official capacity and David R. DiGiacomo are dismissed with prejudice, each party to bear their own costs and attorney's fees.

Pursuant to and in accordance with the order filed on January 19, 2001 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that the fourth claim for relief (First Amendment - Free Exercise Clause) asserted against all Defendants is dismissed with prejudice, each party to bear their own costs and attorney's fees.

Pursuant to and in accordance with the Court's findings made on the record at the conclusion of the Trial to Court on October 15, 2001, the Findings of Fact, Conclusions of Law and order filed on November 1, 2001, and the order filed on November 6, 2001 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of Plaintiffs and against Defendant, Jefferson County School District R-1, on Plaintiffs' first claim for relief based on a violation of the Free Speech Clause of the First Amendment. It is

FURTHER ORDERED that Plaintiffs' request in the first claim for declaratory and injunctive relief is granted consistent with the Order. Specifically, as to the injunctive relief, Defendants are ordered by November 4, 2001, to: (1) provide an opportunity and place for Mr. and Mrs. Fleming to paint the tiles they wished to

paint but were precluded from painting; (2) mount the tiles painted by the Petrones and Rorboughs that are at issue in this case; and (3) mount on the walls of Columbine High School the tiles painted by Mr. and Mrs. Fleming after they have been given the opportunity to paint the tiles they wished to paint but were precluded from painting. It is

FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs and against Defendant, Jefferson County School District R-1, on Plaintiffs' second claim for relief for a violation of Article II, Section 10 of the Colorado Constitution. It is

FURTHER ORDERED that judgment is hereby entered in favor of Defendant, Jefferson County School District R-1, and against Plaintiffs, Donald F. Fleming, Diedra A. Fleming, Lisa M. Maurer, Brian E. Rohrbough, Susan Petrone, Richard P. Petrone, and Nicole M. Petrone, on Plaintiffs' third claim for relief for a violation of the Establishment Clause on the First Amendment. It is

FURTHER ORDERED that judgment is hereby entered in favor of Defendants, Tori Merritts and Debby Oberbeck, and against Plaintiffs, Donald F. Fleming, Diedra A. Fleming, Lisa M. Maurer, Brian E. Rohrbough, Susan Petrone, Richard P. Petrone, and Nicole M. Petrone, on all of Plaintiffs' claims. It is

FURTHER ORDERED that judgment is hereby entered in favor of Defendant, Jon DeStefano, and against Plaintiffs, Donald F. Fleming, Diedra A. Fleming, Lisa M. Maurer, Brian E. Rohrbough, Susan Petrone, Richard P. Petrone, and Nicole M. Petrone, as to all claims asserted against him in both his official and individual capacities. It is

FURTHER ORDERED that judgment is hereby entered in favor of Plaintiffs, Donald F. Fleming, Diedra A. Fleming, Lisa M. Maurer, Brian E. Rohrbough, Susan Petrone, Richard P. Petrone, and Nicole M. Petrone, and against Defendant, Jefferson County School District R-1, on Plaintiffs' fourth claim for relief since the Court awarded reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. It is

FURTHER ORDERED that Plaintiffs shall file a statement of their attorneys' fees within thirty (30) days of October 15, 2001, or by November 14, 2001.

FURTHER ORDERED that Plaintiffs shall have their costs by the filing of a Bill of Costs with the Clerk of this Court within ten (10) days of entry of judgment.

NUNC PRO TUNC to October 15, 2001.

DATED at Denver, Colorado this 7th day of November, 2001.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By /s/
Stephen P. Ehrlich,
Chief Deputy Clerk

APPROVED AS TO FORM:

/s/
Wiley Y. Daniel
United States District Judge

D1

UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 99-D-1932

DONALD F. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE, (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend, Richard P. Petrone,

Plaintiffs,

v.

JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a Colorado Quasi-Municipal Corporation, and JON DeSTAFANO, individually and in his official capacity

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DANIEL, Judge

I. INTRODUCTION

This case is brought pursuant to 42 U.S.C. §§ 1983 and 1988 for an alleged violation of Plaintiffs' constitutional rights arising from

Defendants' refusal to allow Plaintiffs to honor their slain children and/or friends in a public forum at Columbine High School by painting tiles that have a religious content and/or that have the date April 20, 1993. Plaintiffs seek declaratory and injunctive relief and their attorneys' fee.

Specifically, Plaintiffs seek: (1) declaratory and injunctive relief in connection with Defendants' alleged violation of the Free Speech Clause of the First Amendment; (2) declaratory and injunctive relief in connection with Defendants' alleged violation of Plaintiffs' free speech rights under the Colorado Constitution; (3) declaratory and injunctive relief in connection with Defendants' alleged violation of the Establishment Clause of the First Amendment; and (4) costs and attorneys fees under 42 U.S.C. § 1988. The injunctive relief sought by Plaintiffs is an order requiring Defendants to mount Plaintiffs' tiles that were painted and previously refused on the walls of Columbine High School. Plaintiffs also ask that Defendants be required to provide another tile session whereby Plaintiffs can paint the tiles they were not allowed to paint, and for these new tiles to be mounted on the walls of Columbine High School.

Defendants filed a motion to dismiss the complaint, which the Court denied. The parties also filed cross motions for summary judgment, which the Court denied. After a five-day trial, the Court makes the following Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT

1. Plaintiffs Diedra A. Fleming (hereinafter referred to as "Mrs. Fleming") and Donald F. Fleming (hereinafter referred to as "Mr. Fleming") are residents of Jefferson

County, Colorado. Their daughter, Kelly Fleming, was a student at Columbine High School (hereinafter referred to as "CHS").

2. Plaintiff Lisa M. Maurer (n/k/a Lisa Rohrbough) (hereinafter referred to as "Mrs. Rohrbough") was at the time of the tile painting which is the subject of this lawsuit a friend of Plaintiff Brian E. Rohrbough (hereinafter referred to as "Mr. Rohrbough") and was also a friend of Mr. Rohrbough's son, Daniel Rohrbough. Subsequent to the filing of this case, she married Mr. Rohrbough. Mr. Rohrbough is a resident of Jefferson County, Colorado. His son, Daniel Rohrbough, was a student at CHS.

3. Plaintiff Susan A. Petrone (hereinafter referred to as "Mrs. Petrone") was the mother of Daniel Rohrbough. Plaintiff Richard P. Petrone (hereinafter referred to as "Mr. Petrone"), is Mrs. Petrone's current husband. The Petrones are residents of Jefferson County, Colorado. Plaintiff Nicole M. Petrone (hereinafter referred to as "Ms. Petrone") was at all times pertinent hereto a minor child, a resident of Jefferson County, Colorado, and a student at CHS. Ms. Petrone was the step-sister of Daniel Rohrbough, and her father is Mr. Petrone.

4. CHS is located in Littleton, Colorado, in the Jefferson County School District R-1. CHS educates approximately 2000 students with a staff of 180 persons.

5. Defendant Jefferson County School District No. R-1 (hereinafter referred to as the "School District"), describes itself as a quasi-municipal corporation, and is a School

District formed and organized pursuant to the laws of the state of Colorado. The School District operates numerous primary and secondary public schools in Jefferson County, Colorado. Among the schools operated by the School District is CHS.

6. Jon DeStefano (hereinafter individually referred to as "Mr. DeStefano"), Tori Merritts, David R. DiGiacomo, Debby Oberbeck, and Vince Chowdhury (hereinafter collectively referred to as the "School Board") were in April of 1999 and in the summer and the fall of 1999 the duly elected and acting School Board for the School District.[1] Mr. DeStefano, who is sued in his individual and his official capacity, was at all times material hereto the President of the School Board for the School District. Plaintiff asserts that Defendants Tori Merritts and Debby Oberbeck are sued in their official capacities only, notwithstanding the designations in the caption of the Complaint.

7. Daniel Rohrbough and Kelly Fleming were students at

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1 Defendants David R. DiGiacomo and Vince Chowdhury were members of the School Board up to November 11, 1999 at which time they left the School Board. The parties have stipulated to the dismissal of Defendants DiGiacomo and Chowdhury from this lawsuit, and the Court previously entered an Order dismissing them. Further, to clarify the Complaint, Defendant Jon DeStefano is sued in his individual and official capacities. Defendants Tori Merritts and Debby Oberbeck are sued in their official capacities only, no withstanding the designations in the caption of the Complaint. The distinction was made by the Plaintiffs based upon discovery in this case.

CHS in April of 1999.

8. On April 20, 1999, two CHS students, Eric Harris and Dylan Klebold, entered the premises of CHS and shot numerous students and teachers before committing suicide. Twelve students and one teacher were killed by the gunmen, including Daniel Rohrbough and Kelly Fleming. In addition, twenty-six other students were injured, some quite seriously.

9. Prior to the April 20, 1999 shootings at CHS, students had engaged in what has become known as the "tile project". The tile project consisted of the painting and preparation of ceramic tiles measuring approximately four inches by four inches. The finished tiles were placed on the walls of the school hallways, initially in the art wing and the main hallways. They were put up as a border strip five and one-half (5½) feet off the ground above the lockers.

10. The practice of painting ceramic tiles and affixing them as decorations on the walls of CHS began with a proposal made to the school administration in the fall of 1996 by two art teachers, Erin Yust-Brown and Barbara Hirokawa (hereinafter referred to as "Ms. Hirokawa").

11. The tile project was approved and glaze colors for decorating the tiles were prescribed. As initially implemented by the art teachers, tile decorations had to be abstract or nonobjective with no symbols or words. Tiles that did not comply with the guidelines as set by the art teachers or tiles which the teachers considered inappropriate or simply unattractive were washed off prior

to glazing the reused.

12. The tiles drew the attention of teachers from other departments who also wished to brighten the appearance of the hallways outside their classrooms. As other classes began making tiles under the supervision of non-art teachers, some tomes began to include recognizable images related to the content of the classes, such as frogs, bugs, volcanoes, and lightning for earth science.

13. There was no requirement for artistic merit or ability in order to participate in this particular tile painting activity. There were approximately one hundred and fifty (150) tiles painted in connection with the above project.

14. Subsequent to the April 20, 1999 shootings at CHS, the Jefferson County Sheriff's Department sealed the school building with the students' personal belongings and the school's instructional materials inside. The student body from CHS attended classes at Chatfield High School.

15. The CHS students continued to paint tiles at Chatfield under the direction of teaching assistants outside the regular Columbine staff and parent helpers. The painting was done by the science department, which continued to paint recognizable subjects. Further, other CHS students attending Chatfield were allowed to paint tiles. The tiles which were painted contained Columbine ribbons (blue and silver ribbons in a loop in memory of those who died and were wounded), initials, Columbine flowers, tears, and broken hearts. About 1,000 tiles were done by students while attending Chatfield.

16. In June, 1999, the School District determined that the CHS building should be renovated and reopened. The prospect of reintroducing the students to the CHS building posed significant mental health challenges. School officials made a concerted effort to change the appearance of the building to avoid incorporating sensory cues that could reactivate memories of the attack.

17. In the summer of 1999, the tiles painted at Chatfield High School were installed in the hallways of CHS. These tiles were installed down the two north-south hallways at CHS.

18. In June or early July 1999, CHS librarian Elizabeth Keating (hereinafter referred to as "Ms. Keating") and Ms. Hirokawa proposed tile painting as an activity to assist in community healing by allowing the community to "retake" the school by participating in its restoration. They obtained approval from Barbara Monseu (hereinafter referred to as "Ms. Monseu"). Ms. Monseu was the area administrator responsible for three high schools (including CHS and Chatfield) and their feeder schools. Ms. Monseu was also the School Board's designated liaison to the families of shooting victims.

19. Thus, during the summer of 1999, the tile project continued, although the purpose of the project and the persons allowed to participate in the project changed from what the project had been before. Specifically, the purpose of the project changed from a student project supervised by teachers to a community healing process whereby certain members of the general public that included students, families and friends of students, alumni,

rescue workers, health care professionals who treated the injured and other members of the community who were invited to express themselves regarding the shootings as part of the healing process. This was testified to by Ms. Monseu, Frank DeAngelis, and Ms. Keating.

20. This modified tile project which began in the summer of 1999 is the tile project at issue and which is referred to subsequently in the Findings of Fact and Conclusions of Law.

21. A School District press release announcing the modified tile project as it related to CHS students said that "this new project will serve two purposes. 'Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be a part of the reconstruction of their school.'" Plaintiffs' Exhibit 6.

22. Ms. Monseu's primary concern with the continued tile project was that nothing be placed in the building that would be harmful to the students. She consulted with other members of the CHS response team, including persons coordinating mental health efforts. To assure that the interior of the building would remain a positive learning environment and not become a memorial to the tragedy, Ms. Monseu directed that there could be no references to the attack, to the date of the attack, April 20, 1999 or 4/20/93, no names or initials of students, no Columbine ribbons, no religious symbols, and nothing obscene or offensive.

23. Plaintiffs' Exhibit 8 is Ms. Monseu's handwritten notes outlining the restrictions on content for tiles painted in the summer of 1999. The notes say, "The following guidelines will be used to determine which tiles will be hung in Columbine High School" and that "[t]iles which do not fit within these parameters will not be hung and can be claimed by the person who made the tile." Id. These guidelines were discussed with the CHS principal, assistant principal, administrators, the School District superintendent, deputy superintendent and others prior to approval of the tile painting project in the summer of 1999.

24. The School Board was also advised of the tile project to take place in the summer of 1999 and the guidelines on content restriction. The president of the School Board, Mr. DeStefano, heard about the project in a briefing from the School District Superintendent. Mr. DeStefano also told the other members of the Board about the tile project. Mr. DeStefano admitted that it was the "strong consensus of the Board" that there be no religious symbols on the tiles displayed in the school. Further, Mr. DeStefano told the Petrones and Rohrboughs that he "personally had a problem with religious symbols" on the tiles and that it was Board policy to have no religious symbols of any kind in the school building.

25. Ms. Monseu testified that she told the persons with whom she discussed the tile project and guidelines that "this is a project outside of the school, this is a separate project, but we're trying to keep track of what's going on, not necessarily control everything, but keep track of what's going on."

26. The first tile painting activity was held at CHS on or about July 19, 1999. Two sessions were held on that day. The sessions were led by Ms. Hirokawa, Ms. Keating, and art teacher Pua Warnke (hereinafter referred to as "Ms. Warnke").

27. In the morning of July 19, 1999, CHS students, CHS graduates from the 1998-1999 school year, and incoming freshmen were allowed to paint tiles. Brothers and sisters of CHS students and incoming freshmen were also there and were allowed to paint tiles. One of the art teachers did a tile with her infant daughter. This tile painting session included opportunities for the media to be present.

28. In the afternoon of July 19, 1999, the victims and families of the April 20, 1999, shooting victims were allowed to paint tiles without any media being present. The victims and families were accompanied by other persons, including friends of the family. Photographs of the tile painting sessions were taken and admitted into evidence as Plaintiffs' Exhibit 10.

29. Participants in the tile painting project on July 19, 1999, were informed generally of the guidelines for tile content, and were told the tiles were not to be a memorial to the attack upon the school. A table was set up at the entrance with examples and posters of acceptable tile designs. However, no written guidelines were provided, nor were any instructions provided as to specific symbols that were forbidden as religious expression.

30. Some participants painted tiles that were inconsistent with

the guidelines. Ms. Hirokawa and Ms. Warnke tried to screen and pull those tiles before they were sent to be fired. The volume of tiles produced, however, made it impossible to review each tile. Some tiles that were inconsistent with the guidelines were covered with an opaque glaze before the teachers were able to review them, and were sent out to be fired.

31. Upon their arrival at the school on the afternoon of July 19th, certain of the Plaintiffs were given personal instructions by one of the teachers concerning the project, including the guidelines on contents. These Plaintiffs were upset that they would not be able to express themselves in the manner that they saw fit and objected. Some of the Plaintiffs insisted that they be allowed to ignore the guidelines. Not wishing to come into conflict with parents of murdered students, the teachers accommodated some of the Plaintiffs by permitting them to paint what they wished, but informed them that tiles that were inconsistent with the guidelines would be fired separately and would not be affixed to the walls, but would be given to them for their personal use. Other Plaintiffs did not get to paint the tiles they wished to paint.

32. Specifically, at the July 1999 tile session, Mrs. Petrone had planned to paint a tile with a heart and a cross and her son's name at the bottom. In spite of the instructions by the teachers to the contrary, she painted the tile she had planned. See Plaintiffs' Exhibit 2. This tile was not mounted on the walls of CHS.

33. Mr. Petrone made two tiles at the July session. See id.

One was a "stick man" with Daniel Rohrbough's name. The other tile was divided by a "cross" into four grids, with the letters L O V E, one in each grid. There was a peace sign painted in the "O". These tiles were not mounted on the walls of CHS.

34. Ms. Petrone painted a tile at the July tile session in memory of her step-brother, Daniel Rohrbough. Her tile contained a rose, a heart, a yellow cross in between the heart and stem of the rose, and the words "Danny Rohrbough". See id. This tile was not mounted on the walls of CHS.

35. Mr. Rohrbough was told by librarian Ms. Keating at the July tile session that he could not paint tiles with religious symbols. He responded to her that he was invited here because his son was killed right outside that window. Mr. Rohrbough painted two tiles. One had a yellow background with 13 crosses painted in red. See Plaintiffs' Exhibit 1. The second one contained a Bible verse which says, "There is no peace says the Lord for the wicked". See id. Underneath this verse it says "Dan Rorbough". Mr. Rohrbough believed when he painted the tiles that they would be fired with the rest of the tiles and placed randomly in the school hallways. However, these tiles were not mounted on the walls of CHS.

36. Mrs. Rohrbough (now Lisa Maurer) also painted two tiles at the July tile session. One of them said, "Jesus Christ is Lord" with the initials "D.R." See id. The other tile contained a cross dividing the tile into four quadrants, one quadrant containing a heart, one a fish symbol, one a small hill with three crosses and one containing the initials "D.R.".

Id. The "D.R." initials on both tiles stood for Daniel Rohrbough. These tiles were not mounted on the walls of CHS.

37. Mrs. Rohrbough testified that the only reason she was invited to paint a tile was because of her connection to Daniel Rohrbough. She had nothing to do with CHS other than her relationship with Daniel Rohrbough.

38. Mrs. Fleming also went to the first tile painting session in July, 1999. She found out from people around her that you couldn't put dates, names, religious symbols, or the Columbine ribbon on the tiles. Mrs. Fleming had wanted to paint a tile with "4/20/99" and "Jesus Wept" on it. She testified that she was deflated and crushed when she could not paint her tile. She painted another tile with a peace sign and a dove and one with a tree. According to Ms. Fleming's testimony, an art teacher told her to put her name on it and "we'll get it up."

39. In addition to the July 19, 1999, tile painting session, a subsequent tile painting session was held at CHS in August of 1999. Persons invited to paint tiles at that session included rescue workers, families of injured and deceased victims, police, firemen, ambulance attendants, and workers at area hospital emergency rooms, all of whom had been involved in some way with the events on April 20, 1999. Hundreds of people painted tiles at that session.

40. Mr. Fleming went to that second tile painting session. He learned of the restrictions that had been imposed through what his wife had told him. As a result of the restrictions,

he painted a tile with a green alien. However, he had also wanted to paint a tile that said, "4/20/99" and "Jesus Wept". Mr. Fleming testified that he and his wife thought that this was the most appropriate tile for the feelings that had for their murdered daughter. Mr. Fleming testified that he felt he was stabbed in the heart and was offended when he couldn't paint the tile he wanted to paint.

41. In addition, there was also a tile painting session held in August of 1999 at the class reunion for the CHS class of 1989. Anyone who attended that reunion could paint a tile, regardless of their connection with CHS.

42. In conformance with the guidelines imposed by area administrator Ms. Monseu, persons who were invited to the various tile painting sessions were generally told of the restrictions, including the ban on any religious symbols and the date of the shooting. However, no written guidelines were ever provided.

43. Further, the teachers in charge of the tile paintings were not given written guidelines or a list of symbols that were prohibited. No announcements or written guidelines were posted either.

44. The tiles and supplies that were used in the tile project after the April 20, 1999, shootings did not come from funds appropriated by the School District. Instead, according to a Stipulation found at Plaintiffs' Exhibit 14, the tiles and supplies were paid for by private donations received by the Jefferson Foundation and the Columbine Memorial Account.

45. Specifically, Plaintiffs' Exhibit 14 states that "The Jefferson Foundation is a private foundation which was organized exclusively for educational and charitable purposes to provide cooperation and support for the Jefferson County School District R-1" and that "Following the April 20, 1999, attack on Columbine High School, the Foundation received donations earmarked for Columbine High." Deposition Exhibits 20 and 21 were received into evidence that detailed all moneys received by the Jefferson Foundation for CHS as of September 29, 1999, as well as the income and expenditures for the CHS fund. Exhibit 14 states, "Out of the Columbine High School Fund The Jefferson Foundation expended the sum of $2,038.82 to pay for the tile project subsequent to the April 29, 1999, shootings...." The Jefferson Foundation paid this sum directly to the vendors who provided the supplies to the tile project after April 20, 1999. Exhibit 14 also states that "Additional funding for the tile project in the amount of $195.05, was provided through the principal's discretionary fund, a subaccount of the Columbine Memorial Account that was funded through donations to be used at the school's discretion." Exhibit 14 concludes, "The source of funds received for Columbine High School subsequent to the shootings, and hence the source of funds used to pay for the tile project, was private donations to be used at the discretion of the high school's administrators."

46. After the tiles were fired and shortly before the school year was to begin, Ms. Keating organized parent volunteers to affix them to the walls. She instructed them that if any tile was questionable or inappropriate, it was to be set aside. Ms. Keating left the decision as to what was inappropriate

to the volunteers, believing that the art teachers previously had screened the tiles. Some tiles were screened out at this point, but Ms. Keating was unable to supervise on a tile-by-tile basis.

47. Shortly before the CHS building was to be opened, Ms. Monseu inspected the building and noticed that there were tiles on the wall that did not comply with the guidelines. Ms. Monseu noticed three or four tiles that were objectionable. One had Danny Rohrbough's name on it, one had a scripture, and a couple tiles had crosses.

48. Ms. Monseu immediately met with Principal Frank DeAngelis and Assistant Principal Pat Patrick (hereinafter referred to as "Ms. Patrick"), instructed Ms. Patrick on the guidelines, and directed her to remove any tiles that included the date April 20 or 4-20, names or initials, tiles that were personalized, and tiles that had a religious connotation. Ms. Monseu left the definition of what constituted a "religious connotation" to Ms. Patrick's judgment and provided no specific guidelines about this. Ms. Monseu stated that Ms. Patrick and other staff members who assisted her were to look at each tile and decide on a tile by tile basis what was too religious to be placed on the walls at CHS.

49. In response to Ms. Monseu's directives, Ms. Patrick and other staff members walked the halls of CHS to identify "inappropriate" tiles, marked the tiles with a stickynote and had the custodian help with their removal. The search for tiles was done over a week long period, and after tiles were pulled down, she still saw some that she had missed.

50. To the extent possible, Ms. Patrick examined each and every tile that had been put up to see if was "appropriate". Ms. Patrick removed tiles with crosses, the "Jewish star", and angels, the blue Columbine ribbon, the date "4-20", and tiles with initials and/or names on them, such as a tile with the initials "DK" incorporated into the design (thought to represent the initials of Dylan Klebold). Other tiles that were deemed inappropriate were also removed, such as a tile with the anarchy symbol, tiles with gang graffiti, a tile depicting a face with blood dripping from the temple, and tiles that Ms. Patrick believed may have incorporated symbols with a meaning discernible only to juveniles hoping to get away with something. Ms. Patrick removed a tile mural created by Ms. Warnke because it included her name. She removed a tile mural created by art teacher Erin Yust-Brown because its red colors were disturbing to some people. In total, Ms. Patrick testified that she removed approximately 80-90 tiles out of approximately 2100 tiles that had been put up.

51. The School District superintendent and the School Board knew that "inappropriate" tiles had been put up and would be taken down.

52. Tiles that were taken down had plain tiles put back in their places. The contractors working in the school used their own blank tiles to fill in the holes left by the removal of "inappropriate" tiles.

53. Subsequent to encountering problems with being allowed to paint tiles with religious symbols and the removal of "inappropriate" tiles, the Plaintiffs and parents of other

victims had a meeting with Ms. Monseu at which objections regarding the tile project were discussed. At that meeting, Ms. Monseu said that tiles with religious symbols would not be put up.

54. Subsequent to this first meeting, a second meeting was held between Plaintiffs, families of victims, and Ms. Monseu on or about September 9, 1999. At that meeting, Ms. Monseu relaxed the restrictions that had previously been imposed, telling the families of the victims that they could paint tiles with their children's names, initials, dates other than 4-20, and the Columbine ribbon, that is, anything but religious symbols, the date of the shooting, or anything obscene or offensive. Ms. Monseu further stated that these tiles would be put up in the school. Plaintiffs' Exhibit 9 is Barbara Monseu's notes of that second parent meeting and the change in policy by the school board that this meeting represented.

55. The Plaintiffs testified that none of them actually went to the school to repaint any tiles after this change of policy occurred because they had made their expressions previously or been denied the opportunity to paint the tiles they wanted to paint.

56. Witnesses for the Defendants testified that the reason the restrictions regarding names, initials, the date of the shooting, and religious symbols were necessary was to remove all reminders of the shooting from the hallways of CHS in order to prevent returning students from being traumatized. Further, witnesses for the Defendants testified that the restrictions on the tiles were designed to prevent

the tile project from becoming a memorial to the victims of the shooting.

57. However, after the shooting CHS received numerous plaques, memorials, legislative resolutions, etc. See Plaintiff's Exhibit 3. These were placed in the administrative offices and/or other places inside CHS which the students have access to. These include a framed poster that stated "God Wept Over Columbine This Day, April 20, 1999", a plaque that said "IN HONOR OF THOSE THAT LOST THEIR LIVES OR THOSE THAT HAD THEIR LIVES CHANGED FOREVER ON APRIL 20, 1999", a framed picture which contained victim Lauren Townsend's sports jersey, photos and a Columbine ribbon, and a memorial plaque in honor of Lauren Townsend. In addition, the School District allowed Rebel Corner, a student store near the commons area of the school, to sell caps memorializing the victims of the shooting.

58. The School District itself allowed a display case near what was the entry way to the library where 10 students were slain. See Plaintiff's Exhibit 4. The display case contained the "Columbine Hands" statue, which was a prototype for a proposed permanent memorial to the Columbine victims made by a local artist. There was also a "We are Columbine" teddy bear designed by a student at CHS who was shot on April 20, 1999 and her sister. The teddy bear was taken on a space shuttle flight. A memorial plaque in the display case was donated after the shuttle flight. The display case also contained a framed plaque with the words "In Loving Memory" and the photographs of Daniel Mauser and Rachel Scott, two of the students killed in the

shooting. This same plaque contained Columbine ribbons, a remembrance of the victims of the shooting, in each of the upper corners of the plaque. Finally, a sandstone memorial to slain teacher Dave Sanders was installed at the entrance to the school's baseball field. See Plaintiffs' Exhibit 5. The memorial contains the words, "for the eternal memory of Dave Sanders - Summer 1999". Id.

59. Witnesses for the Defendants also testified that the reason that religious symbols were prohibited was that the School District did not want religious symbols in any of its schools. Ms. Monseu testified that the reason symbols were not permitted was so that the School would not advocate for or against a particular religion.

60. However, the hallways in the art wing of CHS contained several mobiles sent to the school from Fort Collins High School which had references to God, crosses, and other items with religious connotations. See Plaintiffs' Exhibit 3, Photos 224-238. No one objected to the presence of the mobiles in the school, in spite of the religious symbols. There is also a line of photographs at the top of the walls in the art hallways which is purported to be the history of art. It contains many pictures with religious objects. No administrators told Ms. Hirokawa, the head of the CHS art department to take down the depiction of religious symbols in this history of art.

61. The Defendants' representatives who testified stated that there had never been any problems with religious symbols in the school, religious clothing, sectarian violence, or anything of that nature. The tiles never caused any

controversy prior to the ban on religious symbols. Religious T-shirts and jewelry were allowed. Further, Mr. Monseu testified that the ban on religious symbols was not based upon any fear that the symbols would cause polarization or any type of harassment problems at CHS.

62. After commencement of this litigation, Plaintiffs photographed the hallways of CHS. Those photographs, depicting the hallways, the tiles and other items in the hallways, are contained in Plaintiffs' Exhibit 3. The photographs show that there were numerous non-abstract tiles that were put up on the walls, including tiles with names, initials, and messages. (Ex. 3, photograph #'s 29, 39-42, 51, 53, 61-65, 67-71, 76, 78-80, 82, 84, 86, 89, 99, 101, 105, 109, 119, 120, 123, 125, 127-132, 143, 148, 152, 153, 157, 160, 165, 174, 175, 186 & 201; see also photograph #'s 58-60, 71, 74, 75, 77, 78, 85, 90, 102, 119, 173, 194 & 200). There are tiles with fish, but not the "Christian fish". (Ex. 3, photo #'s 19, 24, 124, 126, 149, 158, 159, 166, 172, 205 & 206). There is a tile with the initials "MK #70" which appears to be a memorial to student Matthew Kechter who was slain at CHS on April 20, 1999. (Ex. 3, photo #139).

II. CONCLUSIONS OF LAW

A. The Alleged Violation of the Free Speech Clause of the First Amendment to the United States Constitution (first Claim for Relief)

1. I first address the alleged violation of the Free Speech Clause of the First Amendment asserted in Plaintiffs'

first claim for relief. A three-step framework is used when analyzing restrictions on private speech on government property. Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788 (1985); see also Wells v. City and County of Denver, 257 F.3d 1132, 1138-39 (10th Cir. 2001), cert. denied, 70 U.S.L.W. 3246 (Oct. 29, 2001). First, the Court must decide whether the speech at issue is protected by the First Amendment. Cornelius, 473 U.S. at 797. If so, I must then "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Id. Third, I "must assess whether the justifications for exclusion from the relevant forum satisfy the relevant standard". Id. Stated differently, I must determine whether a content-neutral restriction can survive strict scrutiny, whether a content-neutral restriction is a valid regulation of the time, place, or manner of speech, or whether a restriction on a nonpublic forum is reasonable." Wells, 257 F.3d at 1139.

2. When the government is the speaker, however, "'different principles' apply." Wells, 257 F.3d at 1139 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995)). "When the government speaks, either directly or through intermediaries, it is constitutionally entitled to make 'content-based choices,'...and to engage in 'viewpoint-based...decisions'". Id (quoting Legal Serv. Corp. v. Valazquez, 531 U.S. 533 (2001)). Thus, the "analysis of restrictions that arise in the context of government speech is 'altogether different' than the analysis set

forth in *Cornelius*." Id. (quoting Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 235 (2000)). Thus, the Court must determine before it proceeds to the forum analysis whether the tile painting project was "government speech".

3. I must also determine whether the speech was school-sponsored or was speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school" as discussed in Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 271 (1988). Under Hazelwood, school officials may exercise control over "school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." Id. at 273. Legitimate pedagogical concerns include the "emotional maturity of the intended audience", speech that is "inconsistent with 'the shared values of a civilized social order'", and speech that "associate[s] the school with any position other than neutrality on matters of public controversy." Id. at 272 (quoting Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

4. With that legal backdrop in mind, I first find that the tile painting activities of the Plaintiffs constitute protected speech. "[T]he Constitution looks beyond written or spoken words as mediums of expression." Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995). "[P]ictures, films, paintings, drawings, and engravings...have First Amendment protection...." Kaplan v. California, 413

U.S. 115, 119-120 (1973). I find that the tiles in this case are analogous to paintings and other types of symbolic expression that are recognized speech protected by the First Amendment.

5. Further, in connection with the religious aspects of the tiles, I find that religious speech and speech from a religious viewpoint are protected by the First Amendment. Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1278 (10th Cir.), cert. denied, 519 U.S. 949 (1996). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995). Thus, the religious content of some of the tiles at issue is also protected speech under the First Amendment.

6. I now turn to the question of whether the tile painting activities constitute government speech, since that will determine whether the forum analysis is even applicable. Defendants argue that the speech was government speech by the School District because the District was responsible for the appearance of the interior hallways of CHS and exercised control over the tile painting project and the mounting of tiles on the hallway walls. Defendants thus assert that they did not open a forum of any sort, and that they could exercise content-based choices as to the tiles to be placed on the walls. Defendants argue that "[t]he Plaintiffs were no more at liberty to disregard their instructions as to

what the hallways should look like than a contractor could ignore construction specifications." Proposed Conclusions of Law, p.9.

7. Defendants rely on the Tenth Circuit's decision in Wells in arguing that the tile project was government speech. Wells dealt with a challenge to aspects of a holiday display at the City and County Building in Denver. The plaintiffs wrote a letter to defendant John Hall, the Director of Public Office Buildings for the City and County of Denver, requesting permission to place a sign inside the particular year's display. The letter quoted the text of the proposed sign called "Winter Solstice" which indicated, "There are no gods, no devils, no angels, no heaven or hell", "[t]here is only our natural world", "THE 'CHRIST CHILD' IS A RELIGIOUS MYTH", "THE CITY OF DENVER SHOULD NOT PROMOTE RELIGION" as well as other things. See Id., 257 F.3d at 1137. When the City didn't respond to the letter, the plaintiffs posted the sign as part of the display and the City subsequently removed it.

8. The Tenth Circuit found that the City and County of Denver was the speaker regarding the holiday rather than corporate sponsors listed on a sign in the display. In making this decision, Wells discussed four pertinent factors to consider in determining whether government speech is implicated. These factors are: (1) that "the central purpose of the...[speech at issue] is not to promote the views of the [private speakers]; (2) that the [government] exercised editorial control over the

content of [the speech at issue]; (3) that the literal speaker was a [government] employee, not [a private speaker]; and (4) that ultimate responsibility for the contents of [the speech] rested with [the government], not [the private speaker]." Wells, 257 F.3d at 1141 (quoting Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093-94 (8th cir.), cert. denied, 531 U.S. 814 (2000)).

9. Turning to an analysis of the factors in this case, I find that the central purpose of the tile painting project, unlike the holiday display at issue in Wells, was to promote the views and private expression of the Plaintiffs and other members of the community that were invited to paint tiles as part of the healing process subsequent to the shootings. There is no evidence that the tiles they were invited to paint were to express the viewpoint of the School District of CHS. Second, the School District did exercise some editorial control over the content of the tile painting project, but the control was minimal, limited only to restrictions regarding names, initials, the date of the shooting, Columbine ribbons, religious symbols and the other prohibitions discussed herein. This is far different from the situation in Wells where the City and County exercised "complete control over the sign's construction, message, and placement". Id. at 1141. Moreover, unlike Wells where the City and County of Denver built and paid for the sign at issue, in this case the tiles were paid for by private donations. Third, the literal speakers in the tile project were Plaintiffs and other private members of the community, not the School

District or its employees. Again, this is far different than Wells where the sign at issue was a "thank you" from the City to its sponsors. Only the fourth factor favors the Defendants, in that the ultimate responsibility for the contents of the tile project rested with the School District.

10. Nonetheless, I find that the majority of the factors support a finding that the tile painting project was private speech by the Plaintiffs and other members of the community who painted tiles. I thus reject the School District's argument that the tile painting project was government speech.

11. Defendants also rely for their argument that the tile painting project was government speech on Downs v. Los Angeles Unified Sch. Dist, 228 F.3d 1003, 1011-12 (9th Cir. 2000), cert. denied, 121 S. Ct. 1653 (2001). I find that case distinguishable from the case at hand. In Downs, a public school teacher filed suit alleging that his employer, a public high school, violated his free speech rights when it removed, and asked him to remove, competing material that he had posted on a bulletin board in the school in response to materials posted by staff of the high school that recognized Gay and Lesbian Awareness Month. The Ninth Circuit found that the speech at issue on the bulletin boards was government speech. It based its finding on the fact that "[o]nly school faculty and staff [of the school] had access to post materials on these boards", materials posted on the bulletin boards were subject to the oversight of the school principals, who had "ultimate

authority within the school over the content of the boards", and "any speech on the bulletin boards was directly traceable to [the school] and the school board through [the principals'] enforcement of [school] and school board policy." Id. at 1006-1012.

12. In this case, in contrast, the persons who painted the tiles were not school faculty or staff but private members of the community that were invited to the school to express their feelings. Although the tiles were subject to the oversight of school representatives, this oversight was limited only to ensuring that the tiles did not violate the very limited guidelines in place. Finally, the speech on the tiles was not "directly traceable" to CHS and/or the School Board through the enforcement of CHS and School Board policy. Instead, the tiles covered a broad array of topics and speech that was not governed by any policy of the School District, and only a narrow range of speech was prohibited by the School District's guidelines.

13. I now turn to Defendants' argument that the tile painting project constituted school-sponsored speech or speech that members of the public might reasonably perceive to bear the imprimatur of the school under Hazelwood. Again, if Hazelwood is found to be controlling, this will affect the forum analysis. Defendants argue that the tile painting project constituted school-sponsored speech because the project was organized by the school, participants were invited by school staff, they decorated tiles under staff supervision, used paints and tiles paid for with donation

money controlled by school officials, and produced tiles to be permanently affixed in the hallways of the school. Defendants thus argue that the public would perceive the content of the tiles to represent the voice of the school and bear its imprimatur. Defendants further assert that their restrictions on the content of the tiles were reasonably related to legitimate pedagogical concerns because (1) the decision not to permit the tile painting project to become a memorial to and reminder of the shooting is related to the school's legitimate educational interest of ensuring the welfare of students and staff; and (2) schools have a legitimate interest, if not a constitutional obligation, to avoid religious divisiveness in the school setting.

14. I find that the tile painting project was not school-sponsored speech or speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." Hazelwood, 484 U.S. at 271. The Supreme Court in Hazelwood explained that its holding applies to activities conducted as part of the school curriculum. Id. at 271. Specifically, the Supreme Court held in that regard:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's

> personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and other members of the public might reasonably perceive to bear the imprimatur of the school. *These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.*
>
> Id. at 270-71 (emphasis added) (citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)).

15. In Hazelwood, the Supreme Court noted that "[s]chool officials did not deviate in practice from their policy that production [of the student newspaper at issue] was to be part of the educational curriculum and a 'regular classroom activit[y]'." Id. at 268. The newspaper was published as part of a journalism course and the teacher who supervised the newspaper "was the final authority with respect to almost every aspect of the production and publication of [the student newspaper], including its content." Id. In contrast, in this case there was no evidence presented at trial that the tile project was part of the school curriculum or that it was designed to impart particular knowledge or skills to

student participants. Indeed, this argument would be illogical in light of the fact that a large number of tiles painted during the summer of 1999 were painted by members of the community at large. Moreover, the evidence at trial was that the school only had limited input into the tile project and the content of the tiles - limited to an attempt to ensure that tiles that violated the few restrictions stated in the guidelines did not get mounted on the walls.

16. Defendants also cite a number of other cases that found that speech was school-sponsored and subject to the Hazelwood analysis. However, I find that all of these cases are distinguishable. In Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993); Silano v. Sag Harbor Union Free School Dist. Bd. of Educ., 42 F.3d 719 (2nd Cir. 1994), cert. denied, 515 U.S. 1160 (1995); Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990); and Miles v. Denver Public Schools, 944 F.2d 773 (10th Cir. 1991), the speech at issue was that of a teacher/lecturer in a traditional classroom setting. Since such speech was clearly part of the school's curriculum, it was found to be school-sponsored and governed by Hazelwood. See Ward, 996 F.2d at 452-53 ("a teacher's statements in class...part of curriculum and a regular class activity" that is governed by Hazelwood); Silano, 42 F.3d at 723 (the speech was school-sponsored because it was speech of a lecturer "in a traditional classroom setting"); Webster, 917 F.2d at 1008 ("[g]iven the school board's important pedagogical interest in establishing the curriculum and legitimate concern with

possible establishment clause violations, the school board's prohibition...was appropriate"); Miles, 944 F.2d at 776 ("a teacher's expression in the 'traditional classroom setting'...bears the imprimatur of the school") (quoting Hazelwood, 484 U.S. at 271).[2] DiLoreto, although discussing and applying certain aspects of Hazelwood, did not actually decide that the speech at issue was school-sponsored; instead, the analysis conducted by the Ninth Circuit was a forum analysis under Cornelius. DiLoreto v. Downey Unified School Dist. Bd. of Education, 196 F.3d 958 (9th Cir. 1999), cert. denied, 529 U.S. 1067 (2000)[3].

17. Defendants also asserted in their closing arguments that students or other persons coming into CHS five (5) years from now would not know the context of the tile

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2 See also C.H. v. Oliva, 990 F. Supp. 341, (D. N.J. 1997) (speech at issue was that of a student during classroom activities), aff'd in part, vacated in part, 226 F. 3d 198 (3rd Cir. 2000), cert. denied, 121 S. Ct. 2519 (2001); Duran by and through Duran v. Nitsche, 780 F. Supp. 1048, 1054-55 (E.D. Pa. 1991) (speech at issue was that of a student and the restrictions imposed were "rational regulations of activities that are school sponsored and/or curriculum related"), order vacated, app. dismissed, 972 F.2d 1331 (3rd Cir. 1992).

3 Finally, to the extent that Defendant is relying on Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000) in connection with its argument that Hazelwood is controlling, the Court notes that this is not a First Amendment case in which Hazelwood is even implicated, but is an Establishment Clause case.

project, and might believe that the tiles bear the imprimatur of the school. However, what a person believes five years from now is not the appropriate test in determining whether speech is school-sponsored or bears the imprimatur of the school. As the Tenth Circuit noted in Wells in connection with government speech, even assuming that "who the [observer] believes to be the speaker" is even relevant to the inquiry as to whose speech is at issue, the court's "consideration of that factor would be limited to the perception of an informed and objectively reasonable observer." Id., 257 F.3d at 1142. That observer "must be deemed aware of the history and context of the community in which the ...display appears....Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.'" Id. (quoting Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995)).

18. Thus, even assuming that the observer's perception is a relevant factor in connection with determining whose speech is at issue, the inquiry is limited to the perception of a reasonable observer familiar with the history and context of the community and the forum in which the tile project appears. In this case, such an observer would be aware through the press releases and extensive media coverage of the events surrounding the shootings that CHS invited members of the Columbine community in to paint the tiles as part of the healing process, and that the tiles were not painted by or endorsed by CHS or the School District.

Accordingly, I find that this factor, again, even if it is appropriate for consideration, does not support Defendants' argument that Hazelwood is applicable.[4]

19. The Court, having found that the speech is not government speech or school-sponsored speech, must next determine whether the Defendants opened a forum by inviting Plaintiffs and other members of the community to paint tiles. The Supreme Court has traditionally recognized three categories of fora in connection with government property for purposes of the First Amendment: (1) traditional public fora; (2) designated public fora; and (3) non-public fora. Cornelius, 473 U.S. at 806 (1985); see also summum v. Callaghan, 130 F.3d 906, 914 (10th Cir. 1997). The Plaintiffs do not contend that the tile display at CHS is a traditional public forum or even that the forum is a designated public forum. Thus, I need not address those issues. Instead, Plaintiffs contend that

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4 Even if I did find that the speech was school-sponsored speech subject to the Hazelwood analysis, the Circuits are split as to whether Hazelwood allows a school to engage in viewpoint discrimination. See Downs, 228 F.3d at 1010-11 (9th Cir. 2000) (noting "the absence of express 'viewpoint neutrality' discussion anywhere in Hazelwood" and discussing the split amongst the Circuits on this issue). It does not appear that the Tenth Circuit has decided this issue. It may well be that the Tenth Circuit would hold that viewpoint discrimination would not be warranted even if this speech were school-sponsored. However, since I found that the speech was not school-sponsored that Hazelwood is inapplicable, I need not reach this issue.

the forum was in fact a limited public forum, which in the more recent cases has been used to describe a type of non-public forum. Summum, 130 F.3d at 914-15 (citing Cornelius, 473 U.S. at 806 and Rosenberger, 515 U.S. at 829-30).

20. The non-public forum consists of public property which is not by tradition or designation a forum for public communication. Summum, 130 F.3d at 916. When the government allows selected access to some speakers or some types of speech in a non-public forum, but does not open the property sufficiently to become a designated public forum, it creates a limited public forum. Id. When a limited public forum is created, the Supreme Court applies a reasonableness standard under which the state may restrict speech "so long as distinctions are reasonable in light of the purpose served by the forum and are viewpoint neutral." Id. at 914-15 (citing Cornelius, 473 U.S. at 806). In other words, although the analysis in this type of forum is governed by reasonableness, "[t]his does not mean the government has unbridled control over speech,...for it is axiomatic that 'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" Summum, 130 F.3d at 916 (quoting Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993)).

21. I find that the Defendants created a limited public forum in connection with the tile project when they opened the project up to those outside the school, i.e.,

the families of the slain and injured victims and the other members of the public such as the rescue workers and care givers for wounded students. The purpose of the tile painting project as acknowledged by several witnesses, including Ms. Monseu, was to invite persons to express themselves as part of the healing process after the shootings at CHS. By inviting certain members of the general public to express themselves, Defendants opened the school beyond its official uses and created a limited public forum.

22. As the Tenth Circuit held in Summum, "while the government does have wide discretion to regulate a nonpublic forum consistent with the specific purpose for which it was intended - including banning *all* speech displays - problems arise when the government allows *some* speech on the property." Id., 130 F.3d at 918. Thus, where the County allowed the erection of a stone monolith by a private fraternal order on the front lawn of a courthouse, Summum held that the County had created a limited public forum because "[b]y allowing access to the [fraternal order], the County has opened the forum to at least some private expression, clearly choosing not to restrict the forum to official government uses". Id. at 919.

23. Here, just like in Summum, the School District chose to open the school to at least some speech in the form of private expression by members of the Columbine community that were involved with the shootings or the rescue effort at CHS. By choosing to open the school to that expression, the School District created a limited

public forum. Id.; see also Rosenberger, 515 U.S. at 824-830 (university opened a limited public forum in connection with its Student Activities Fund which was designed "to support a broad range of extracurricular student activities" and which authorized payments to outside contractors to fund printing costs of publications issued by student groups); DiLoreto, 196 F.3d at 966-67 (where a high school baseball booster club raised funds by soliciting ads from local businesses, which ads were to be posted on the school's baseball field fence in exchange for a donation, the school district opened a limited public forum in connection with the solicitation of ads); cf. Lamb's Chapel, 508 U.S. at 391 (where the Supreme Court assumed, without deciding, that the lower courts' decision that a school board had created a limited public forum by permitting the after-hours use of school property for certain specific social, civic and recreational uses was correct, but indicated in dicta that Lamb's Chapel's argument that the rules actually created a public forum had "considerable force").

24. I next must determine whether the restrictions on the tile project were reasonable in light of the purpose served by the forum and were viewpoint neutral. There were two distinct areas of speech that were prohibited: (1) tiles that contained names and initials of victims of the shooting or anyone involved in the shootings, the date of the shootings (April 20, 1999, "4/20/99" or "4/20"), the Columbine ribbon that symbolized a reminder of the shooting, as well as obscene or otherwise "inappropriate tiles"; and (2) tiles

that contained religious symbols or religious speech of any kind.

25. As to the first area of speech, the Defendants representatives at trial testified that this speech was prohibited because the School District did not want the tiles to become a memorial to the victims and did not want students to be traumatized by reminders of the shooting. However, the School District ultimately relaxed its restrictions in this area as to families of the victims. In that regard, Ms. Monseu told the families in September, 1999, that they could paint tiles with the names or initials of their children and that these tiles would be mounted on the walls of CHS. The only prohibition that continued to be enforced was that of the date of the shootings. Accordingly, as to this first area of prohibited speech, Plaintiffs contest only the continued restriction on tiles that reference the date of the shooting. Two of the Plaintiffs, Mr. and Mrs. Fleming, wished to paint this date on tiles. Plaintiffs assert that this restriction was not reasonable in light of the School District's purported purpose.

26. I find that Defendants' prohibition of the date of the shootings on the tile ("4/20/99" or "4/20") was not reasonable in light of its purported purpose. This is because Defendants applied inconsistent standards in connection with enforcing this alleged purpose. First, Defendants initially prohibited any reference to speech that might serve as a reminder of the shootings, including names of victims or those involved in the shooting, Columbine ribbons, and the date of the

shootings. However, Ms. Monseu then informed the families that those standards were relaxed as to them and they could paint tiles that contained the names of their children and that those tiles would be mounted on the walls of CHS. The Court finds that allowing the name of a victim to be placed on a tile is no different than allowing the date of the shootings - both serve to act as reminders of the shootings. Further, as to the purpose of the restrictions being the prevention of a memorial, the School District's decision to allow the families to put the names of their slain children on the tiles certainly acts as at least as much of a memorial to the victims as the date of the shootings.

27. Second, if Defendants were sincere in their belief that allowing the date or other reminders of the shooting to be put on tiles would traumatize students, then one would expect the School District and CHS to be consistent in enforcing this prohibition throughout the school. However, the testimony showed that after the shootings, CHS received numerous plaques and memorials, some of which were placed in the administrative offices and/or areas of CHS to which the students have access. One such memorial stated, "God Wept Over Columbine This Day, April 20, 1999", and another said, "IN HONOR OF THOSE THAT LOST THEIR LIVES OR THOSE THAT HAD THEIR LIVES CHANGED FOREVER ON APRIL 20, 1999." Numerous other memorials or reminders of the shooting were allowed by CHS, as detailed in Paragraphs 57 and 58 of the Findings of Fact. Given all of these reminders of the shooting and

memorials that were allowed by the School District, including some that contained the date of the shootings, I find that it is unreasonable for the School District to disallow the date of the shootings on the tiles on the basis that it did not want reminders of the shootings in CHS. In other words, the stated policy is unreasonable because it "is belied by 'objective indicia' of a contrary intent." Hopper v. City of Pasko, 241 F.2d 1067, 1080 (9th Cir. 2001), cert. denied, 70 U.S.L.W. 3091 (October 9, 2001).

28. I turn now to the second prohibited area of speech, that of religious expression, and address whether this prohibition was reasonable and/or viewpoint neutral. Although Defendants argue that the prohibition on religious speech was also to ensure that the tiles would not serve as a memorial, Ms. Monseu testified that this prohibition was in place because the School District prohibited any religious speech throughout the District. Regardless of the Defendants' purpose in enacting this prohibition, I find that the prohibition on religious speech in connection with the tile project is viewpoint discrimination.[5]

29. "[T]he First amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." Lambs Chapel, 508

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5 Based on this finding, I need not address the issue of whether the prohibition on religious symbols was unreasonable in light of the purposes served by the forum. See Good News Club v. Milford Central School, 121 S. Ct. 2093, 2100 (2001).

U.S. at 394. In a limited public forum "when the government moves beyond restricting the subject matter of the speech and targets 'particular views taken by speakers on a subject,' such viewpoint discrimination is 'presumed impermissible.'" Summum, 130 F.3d at 917 (citing Rosenberger, 515 U.S. at 829-30). The same reasoning applies to schools. As the Supreme Court in Rosenberger made clear, although a school may regulate the content of what is expressed when it is the speaker, "'[i]t does not follow...that viewpoint-based restrictions are proper when the [school] does not itself speak or subsidize transmittal of a message it favors but instead...encourage[s] a diversity of views from speakers." Id., 515 U.S. at 833.

30. In this case, Defendants opened CHS up to certain members of the public for them to express their feelings about the shootings as part of a healing process. In connection with that accepted topic of expression, the Defendants allowed expressions of feelings on the tiles from a nonreligious viewpoint but not a religious viewpoint. I find that Defendants' actions constitute prohibited viewpoint discrimination. See Good News Club v. Milford Central School, 121 S. Ct. 2093 (2001) (school that opened a limited public forum to certain after school activities engaged in viewpoint discrimination when it permitted the teaching of morals and character development from a nonreligious perspective but not from a religious perspective); Lamb's Chapel, 508 U.S. at 393-94 (a school district engaged in viewpoint discrimination when it excluded

a private group from presenting films at the school discussing family values because the speech dealt with a subject that was otherwise permissible but was denied because the subject was dealt with from a religious perspective); Rosenberger, 515 U.S. at 830-32 (a University engaged in viewpoint discrimination when it refused to fund a student publication because the publication addressed issues from a religious perspective); Church on the Rock, 84 F.3d at 1279 (City engaged in viewpoint discrimination in connection with policy at Senior Centers which prohibited use of the centers "for sectarian instruction or as a place for worship" because "[a]ny prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint...."; see also Summum, 130 F.3d at 918 ("[i]f...the government permits secular displays on a nonpublic forum, it cannot ban displays discussing otherwise permissible topics from a religious perspective").[6]

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6 I note that the Ninth Circuit decided that viewpoint discrimination did not occur in a limited public forum in DiLoreto. I find that case is, however, instructive in the case at hand. In DiLoreto, a high school baseball booster club raised funds by soliciting ads from local businesses, which ads were to be posted on the school's baseball field fence in exchange for a donation. Mr. DiLoreto, a local businessman, purchased an ad that submitted a design containing the Ten Commandments. The school district declined to pose the sign, and also excluded other "advertisements that involved subject matters deemed sensitive and inappropriate in the public secondary school context." Id., 196 F.3d at 963. the Ninth Circuit recognized that the school district had opened a limited

31. The finding of viewpoint discrimination in this case is particularly justified since there were no real guidelines in place as to what constituted prohibited religious speech. Indeed, Plaintiffs testified that when they showed up for the tile painting sessions, they were given no specific guidelines as to what they could or could not paint. Ms. Monseu testified that it was up to CHS staff members to decide what was a religious symbol and no written guidelines were given to them. The staff members were required to use their own individual judgment in looking at each tile and decide on a tile by tile basis what was too religious to be placed on the walls at CHS. "Allowing government officials to make decision as to who may speak...without any criteria or guidelines to circumscribe their power, strongly suggests the potential for unconstitutional conduct, namely favoring one viewpoint over another." Summum, 130 F.3d at 920. An absence of express standards makes it far too easy for officials to use "post hoc rationalizations" and

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public forum, and found that the exclusion of the Ten Commandments was both reasonable and viewpoint neutral. In holding that the school district's decision was viewpoint neutral, the Ninth Circuit based its finding on the fact that Mr. DiLoreto's ad "was not a statement addressing otherwise-permissible subjects [advertisement of a business] from a religious perspective"; instead, it was merely religious in nature, setting forth the Ten Commandments. Id. at 969. Here, in contrast, the tiles at issue did address otherwise permissible subjects, i.e., the expression of feelings as part of the healing process, but were excluded solely because of their religious perspective.

"shifting or illegitimate criteria" to justify their behavior. Id.

32. I next must consider whether Defendants can "overcome th[e] heavy presumption of impermissibility" regarding viewpoint discrimination. Summum, 130 F.3d at 917. The Tenth Circuit on this issue, interpreting Rosenberger, held that the court "must examine viewpoint-based restrictions with an especially critical review of the government's asserted justifications for those restrictions." Church on the Rock, 84 F.3d at 1279-80. "At a minimum, to survive strict scrutiny the [state's] policy must be 'narrowly drawn to effectuate a compelling state interest.'" Id.

33. Defendants' primary argument as to why they have a compelling state interest in the prohibition against tiles containing religious speech is that they were seeking to avoid a violation of the Establishment Clause. Adherence to the Establishment Clause is a compelling government interest that may justify restrictions on speech. Church on the Rock, 84 F.3d at 1280. However, I first note that it is unclear whether the government's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination on speech. Good News Club, 121 S. Ct. at 2103. The Supreme Court expressly decided in Good News Club not to decide the issue. Id.

34. Even assuming that the government's interest in avoiding an Establishment Clause violation justifies viewpoint discrimination, I find that Defendants are not

justified in relying on the Establishment Clause to authorize the viewpoint discrimination that occurred in this case. As the Tenth Circuit noted in Church on the Rock, "[t]he Supreme Court has made it abundantly clear that providing equal access to a [limited public forum] for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause." Id., 84 F.3d at 1280. Defendants' policy in this case was neutral - they opened the tile project to members of the Columbine community as part of a healing process whereby people could come in and express their feelings about the shootings. Under such a neutral policy, the fact that religious speech was made along with nonreligious speech would not violate the Establishment Clause. As the Tenth Circuit noted in Summum, "[e]ven if religion is benefitted incidentally, so long as the government treats religious and nonreligious speech evenhandedly and cannot be deemed to be sponsoring the religious activity, the government cannot plausibly argue that it is justified in denying private religious speech on public property because it fears the Establishment Clause will be offended." Id., 130 F.3d at 921 (citing Capitol Square, 515 U.S at 762-63 and Rosenberger, 515 U.S. at 839-40). In fact, "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." Rosenberger, 515 U.S. at 839.

35. As to the argument that the students might perceive the

school to be endorsing religion, a factor established in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) that Defendants deem most applicable to their argument, the Supreme Court has indicated that endorsement will be found only where the speech at issue has "a *principal* or *primary* effect of advancing or endorsing religion." Bauchman v. West High School 132 F.3d 542, 555 (10th Cir. 1997), cert. denied, 524 U.S. 953 (1998). "The Establishment Clause prohibits only those school activities which, in the eyes of a reasonable observer, advance or promote religion or a particular religious belief." Id. In this case, the tile project will be seen by the high school students that attend CHS as well as whatever other members of the public enter the school. The Supreme Court has indicated that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990). "[T]here is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." Id. at 251. The Supreme Court in Mergens further noted that the school's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students.' Id.

36. Based on the foregoing, I find that the students of CHS are mature enough to understand that the purposes of the tile project were to foster healing amongst the

Columbine students, families of the victims and other members of the Columbine community, and not to endorse any views of the school. In other words, the students can understand that the tiles that contained religious symbols were not school speech endorsing religion, but private speech "which the Free Speech and Free Exercise Clauses protect." Mergens, 496 U.S. at 250. A reasonable observer or student would be aware of the "purpose, context and history" of education at CHS and would be aware of the purposes of the tile project, and that it did not have a principal or primary effect of endorsing religion. Bauchman, 132 F.3d at 555. In fact, the tiles containing religious expression were very limited in number compared to the total amount of tiles on the walls (only 80 to 90 tiles were removed from the walls whereas approximately 2100 tiles were painted). Further, the reasonable observer or student would be aware that school officials did not actively participate in the project, other than to ensure that the tiles did not exceed the guidelines discussed herein. Finally, CHS and the School District have the ability to control any impressions they give to the students concerning the project, and can make clear that the tiles do not contain an endorsement of the views of the schools.

37. Indeed, applying the Supreme Court's holding in Good News Club, I "cannot say the danger that [the students] would misperceive the endorsement of religion [by the tile project] is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the [religious tiles] were excluded.

Id., 121 S. Ct. at 2106. Accordingly, I find that Defendants cannot rely on the Establishment Clause to justify a compelling state interest in connection with their viewpoint discrimination.

38. Defendants also asserted that they needed to prohibit religious symbols and the date of the shooting so that the tile project would not become a memorial to, and persistent reminder of, the tragedy. In other words, Defendants asserted that these prohibitions were designed for the welfare of students and staff. However, I find that this is not a compelling state interest for the same reasons previously discussed in Paragraphs 26 and 27 of the Conclusions of Law; namely, the School District's inconsistency in enforcing its prohibitions. If the School District truly believed that the prohibition of memorials and/or reminders of the shootings was a compelling state interest, there is no logical reason why the School District wold have changed its policy and allowed the families of victims to paint tiles containing the names of their slain children that would be mounted on the walls of CHS. Moreover, there is no logical reason why the School District would have allowed a poster saying "God Wept Over Columbine This Day April 20, 1999", a plaque stating "IN HONOR OF THOSE THAT LOST THEIR LIVES AND THOSE THAT HAD THEIR LIVES CHANGED FOREVER ON APRIL 20, 1999", or numerous other memorials that existed inside and outside CHS as detailed in Paragraphs 57

and 58 of the Findings of Fact, supra.[7] The same argument applies to Defendants' purported policy to exclude all religious speech from any of the schools in its District. Finally, if the School District truly intended to keep all religious symbols out of the schools, there is no logical reason why it would have allowed the religious symbols that existed at CHS, as detailed in Paragraphs 60 and 61 of the Findings of Fact, supra.

39. In conclusion, I find that Defendants engaged in viewpoint discrimination in connection with the prohibition of religious symbols from the tiles. Further, Defendants have not shown that their policy in this regard is narrowly drawn to effectuate a compelling state interest, or even that they have a compelling state interest in connection with their policy. Accordingly, I find that Defendants violated the Free Speech Clause of the First Amendment in connection with this prohibition. Moreover, I find that Defendants' prohibition of the date of the shootings, April 20, 1999, was not reasonable in light of its purported purpose, and that Defendants also violated the Free Speech Clause of the First Amendment in connection with this

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7 I also reject any argument by Defendants that they had a compelling state interest in excluding religious symbols from the schools to ensure compliance with School District policy that religious symbols be excluded from schools in the District, since Defendants were not consistent in application of this policy either. See Paragraph 59 in the Findings of Fact, supra, which outlines various religious symbols in the school that were allowed by the School District.

prohibition.

40. Accordingly, judgment shall be entered for Plaintiffs and against Defendants on Plaintiffs' first claim for relief for violation of the Free Speech Clause of the First Amendment. Plaintiffs' request therein for declaratory relief is GRANTED consistent with this Order, and I also GRANT Plaintiffs' request for injunctive relief. In accordance with that injunctive relief, Defendants were ordered within twenty (20) days of the Court's ruling issued on October 15, 2001, or by November 4, 2001, to provide an opportunity and place for Mr. and Mrs. Fleming to paint the tiles they wished to paint but were precluded from painting (as described in Paragraphs 38 and 40 of the Findings of Fact, supra.) Moreover, Defendants were ordered within twenty (20) days of the Court's ruling on October 15, 2001, or by November 4, 2001, to mount the tiles of the Petrones and Rohrbough found at Plaintiffs' Exhibits 1 and 2.

B. The Alleged Violation of the Article II, Section 10 of the Colorado Constitution(Second Claim for Relief)

41. Plaintiffs' Second Claim is a pendant state claim which asserts that the tile painting is protected speech under Article II, Section 10 of the Colorado Constitution. Article II, Section 10 of the Colorado Constitution provides that, "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject." Plaintiffs argue that the Colorado

Constitution provides greater protection for free speech than does the United States Constitution, citing Bock v. Westminster Mall Company, 819 P.2d 55, 58 (Colo. 1991).

42. The Court need not address this claim because Plaintiffs conceded at trial that they did not seek to pursue this claim if they prevailed on their First Amendment claim under the United States Constitution. Indeed, Plaintiffs asserted in their proposed Findings of Fact and Conclusions of Law tendered to the Court that the Colorado Supreme Court has allowed a private lawsuit to enforce free speech rights only "[w]here there are no other mechanisms for protecting the rights of the citizen from being violated by government officials, such as no Free Speech claim under the First Amendment." Proposed Findings of Fact, Conclusions of Law, and Order, p. 19 (citing Bock, 819 P.2d at 58). Accordingly, judgment shall be entered for Defendants and against Plaintiffs on their second claim for relief for an alleged violation of Article II, Section 10 of the Colorado Constitution.

C. The Alleged Violation of the Establishment Clause of the United States Constitution (Third Claim for Relief)

43. Plaintiffs' Third Claim for Relief is for violation of the Establishment Clause of the First Amendment. The Establishment Clause dictates that "Congress shall make no law respecting an establishment of religion." Mitchell v. Helms, 120 S. Ct. 2530, 2540 (2000).

The Establishment Clause is made binding on the States through the Fourteenth Amendment. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 757 (1995). In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court articulated a three factor test in determining whether the Establishment Clause has been violated. Under that test, government action does not violate the Establishment Clause so long as it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting religion, and (3) does not foster an excessive entanglement between religion and the state. Id. at 612-13. It is uncertain to what extent the Lemon factors are applicable today. As the Tenth Circuit has noted, "[b]eginning in the 1980s,...the *Lemon* analysis came under vigorous attack by Justices and commentators alike." Bauchman v. West High School, 132 F.3d 542, 551 (10th Cir. 1997), cert. denied, 524 U.S. 953 (1998). However, in a very recent case by the Supreme Court, Lemon was applied by the majority as the applicable law. Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 314 (2000). Thus, I will address the Establishment Clause claim under the Lemon test.

44. However, I also note that Bauchman is the most recent Tenth Circuit pronouncement on the applicability of Lemon. Bauchman noted that, "[a]cknowledging *Lemon's* weaknesses, Justice O'Connor seized the opportunity in *Lynch v. Donnelly* to draft a concurring opinion encouraging the Court to refine the *Lemon* analysis to focus more on whether the government is

'endorsing religion.'" Id. at 551 (quoting Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984)). Bauchman noted that this "'endorsement test'" is now widely accepted as the controlling analytical framework for evaluating Establishment Clause claims." Id. at 552. "Applying Justice O'Connor's refined analysis, the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that 'religion or a particular religious belief is favored or preferred.'" Id. at 551 (quoting County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 592-93 (1989)). Bauchman further explained that "[r]ecent cases suggest the purpose component of the endorsement test should evaluate whether the government's 'actual' purpose is to endorse or disapprove of religion" (*i.e.*, did the government intend to endorse or disapprove of religion). Id. at 551. "The effect component, on the other hand, should evaluate whether a 'reasonable observer,' aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval." Id. at 551-52.

45. The Tenth Circuit concluded in Bauchman that the purpose component of the endorsement test "is an unworkable standard that offers no useful guidance to courts...." Id. at 552. "Nevertheless, the uncertainty surrounding the present Court's position regarding the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general,

cautions us to apply both the purpose and effect components of the refined endorsement test, together with the entanglement criterion imposed by *Lemon*, when evaluating...[an] Establishment Clause claim." Id. Because of the uncertainty surrounding the Lemon test, the Court will apply both Lemon and the test articulated in Bauchman.

46. Plaintiffs argue that the refusal of Defendants to allow the Plaintiffs to place tiles with religious symbols alongside other tiles in Columbine High School sends a message of exclusion and disfavor of religion. By excluding religion and religious expression from the forum opened by Defendants themselves, Plaintiffs argue that Defendants have exhibited the type of hostility toward religion that amounts to a violation of the Establishment Clause of the First Amendment. Further, Plaintiffs argue that Defendants have violated the Establishment Clause by excessively entangling government with religion.

47. I find that Plaintiffs have not proven a violation of the Establishment Clause by Defendants. First, I have not found, and Plaintiffs have been unable to provide, any Tenth Circuit case or any other case that has found a violation of the Establishment Clause under similar circumstances.

48. Second, as to first prong of Lemon, I find that Defendants have shown that their prohibition on religious symbols had a secular purpose. The Tenth Circuit has noted that to sustain an Establishment

Clause claim in connection with this factor, the plaintiff must show the defendants had "no 'clearly secular purpose' for its policy." Bauchman, 132 F.3d at 554 (citations omitted). Plaintiffs have failed to present such evidence. To the contrary, witnesses for Defendants testified that they believed the prohibition on religious symbols, along with the prohibition on reminders of the shootings, was necessary to comply with the Establishment Clause and to prevent the tile project from becoming a memorial to the victims of the shooting.[8] Further, Ms. Monseu testified that the reason religious symbols were not permitted was so that the School would not be seen as advocating for or against a particular religion. Also, I find no evidence that the School District's actual purpose in connection with their prohibition of religious symbols on tiles was to disapprove of religion.

49. Moreover, I find that the policy prohibiting religious symbols on the tiles did not have the principal or primary effect of inhibiting religion, which is the second factor articulated in Lemon. According to Bauchman, this is "an objective inquiry", focused on a "reasonable observer aware of the purpose, context and history" of the particular governmental action at issue. Id., 132

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8 Although the Court previously found that the School District did not have an Establishment Clause defense to the First Amendment violation, this does not affect the conclusion that reliance on the Establishment Clause was a secular purpose of the School District for purposes of the Establishment Clause claim, even if such reliance was misguided in connection with the First Amendment.

F.3d at 555. Here, a reasonable observer familiar with the purpose, context and history of the tile project would be aware that the project was designed to allow members of the community affected by the shootings to paint tiles as part of the healing process. Further, they would be aware that the School District imposed certain prohibitions in connection with the tiles, including the prohibition on religious expression, so that the tiles would not become a memorial. The prohibitions were not designed in any way to inhibit religion.

50. Also, the Tenth Circuit has noted that "the mere fact that the [removal of certain Christian materials by a school] w[as] aimed exclusively at Christian religious materials does not automatically mean the actions' primary effect was to send a disapproving message regarding Christianity....If we must draw any message from the actions, that message must be that the school district disapproves of the teaching of Christianity in the public schools." Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990), cert. denied, 505 U.S. 1218 (1992). Similarly, in this case the mere fact that the School District removed certain Christian tiles from the walls and/or did not allow such tiles to be painted does not mean that the primary effect was to send a disapproving message regarding Christianity, particularly since the School District removed tiles that contained anything that might be deemed as a memorial to the shootings, such as tiles that contained names of the victims or other reminders of the shooting, and other tiles that they deemed to be offensive or

inappropriate for the school.

51. Finally, there was not an excessive entanglement between religion and the School District in connection with the prohibition of religious symbols on the tiles. The Supreme Court in a recent case noted that excessive entanglement is essentially "an aspect of the inquiry into...the effect [of the government action]." Agostini v. Felton, 521 U.S. 203, 231 (1997). "Entanglement must be 'excessive' before it runs afoul of the Establishment Clause." Id. Here, the fact that the School District required that tiles be individually screened to ensure that tiles with religious symbols were removed from the walls simply does not amount to the level of excessive entanglement required for there to be an Establishment Clause violation. See id. at 233 (rejecting argument of excessive entanglement where state program would require monitoring to ensure that Title I employees did not inculcate religion); Bowen v. Kendrick, 487 U.S. 589, 615-17 (1988) (no excessive entanglement where government reviews the adolescent counseling programs set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the programs by periodic visits); Roemer v. Board of Public Works of Md., 426 U.S. 736, 765-65 (1976) (no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

52. In conclusion, I find that Plaintiffs have failed to show that the prohibition on religious symbols in connection

with the tile project violated Lemon or Bauchman. Accordingly, judgment shall be entered for Defendants and against Plaintiffs on their third claim for relief for violation of the Establishment clause of the First Amendment.

D. The Claims Against the Individual Defendants Under 42 U.S.C. § 1983

53. To the extent that Plaintiffs continue to assert official capacity claims against Defendants Tori Merritts, Debby Oberbeck and Jon DeStefano, these claims must be dismissed. Suits against public officials in their official capacity are in reality suits against the state and are barred by the Eleventh Amendment. Kentucky v. Graham, 473 U.S. 159 (1985).

54. To the extent that Plaintiffs are suing Jon DeStefano in his individual capacity, the only actions of Mr. DeStefano that appear to be at issue are his statements that (1) it was the "strong consensus of the Board" that there be no religious symbols on the tiles displayed in the school; (2) that he "personally had a problem with religious symbols" on the tiles; and (3) that it was Board policy to have no religious symbols of any kind in the school building. I find that the first and the third statements were made in Mr. DeStefano's official capacity as President of the School Board, since they state the Board's position on the issue of religious symbols. As such, a claim based on these statements would be barred under Graham.

55. The only statement that appears to be made in Mr. DeStefano's individual capacity is the statement that Mr. DeStefano personally had a problem with religious symbols on the tiles. Plaintiffs appear to recognize this in their Proposed Findings of Fact, Conclusions of Law and Order since that is the only statement that is referenced as to the individual capacity claim. Plaintiffs then argue that Mr. DeStefano was acting under color of state law, and that he violated the Establishment and Free Speech Clauses of the First Amendment by making this statement.

56. Defendants argue that Mr. DeStefano is entitled to qualified immunity on this claim. In Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Supreme Court held that government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known. Harlow places a presumption in favor of immunity of public officials acting in their individual capacities. Schalk v. Gallemore, 906 F.2d 491 (10th Cir. 1990). A plaintiff cannot defeat a defense of qualified immunity merely by alleging a violation of "extremely abstract rights." Anderson v. Creighton, 483 U.S. 635, 639 (1987). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized sense." Id. at 640. Once the defense of qualified immunity is raised by a defendant, the plaintiff must come forward with facts or allegations sufficient to show both that the defendant's alleged conduct

violated the law and that the law was clearly established when the alleged violation occurred. See Workman v. Jordan, 32 F.3d 457, 479 (10th Cir. 1994), cert. denied, 514 U.S. 1015 (1995).

57. I find that Mr. DeStefano is entitled to qualified immunity in connection with the alleged violation of the Establishment Clause. Plaintiffs only make a conclusory statement that Mr. DeStefano violated the Establishment Clause, citing no case authority for this proposition nor any explanation as to how the Establishment Clause was violated by Mr. DeStefano. Accordingly, Plaintiffs failed to meet their burden of showing either that Mr. DeStefano's conduct violated the law or that the law was clearly established that this conduct violated the Establishment Clause.

58. As to the argument that Mr. DeStefano violated the Free Speech Clause of the First Amendment, Plaintiffs asserted in their Proposed Findings of Fact, Conclusions of Law, and Order that the law was clearly established in the summer of 1999 that exclusion of speech from a religious viewpoint in any type of public forum is clearly prohibited, citing Church on the Rock v. City of Albuquerque, 84 F.3d 1273, 1279 (10th Cir. 1996). Even assuming that the law is as broad as Plaintiffs argue, Plaintiffs have failed to explain how a statement about Mr. DeStefano's personal feelings about religious symbols in schools bears on this issue. There was no evidence at trial that the decision to exclude tiles containing religious symbols was made by Mr. DeStefano personally.

Instead, the decision was made by Ms. Monseu and the School Board generally. Accordingly, I find that Mr. DeStefano is also entitled to qualified immunity in connection with this claim. Judgment shall thus be entered in favor of Defendant Jon DeStefano in his individual capacity and against Plaintiffs.

E. Attorneys Fees Under 42 U.S.C. § 1988 (Fourth Claim for Relief)

59. 42 U.S.C. § 1988(b) provides, "[i]n any action or proceeding to enforce a provision of section [] 1981..., the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs...." Pursuant to this statute, I hereby allow Plaintiffs, as the prevailing party on their free speech claim under the First Amendment, to recover their reasonable attorneys' fees as part of the costs in this suit. Plaintiffs shall file a statement of fees that they seek to recover by Wednesday, November 14, 2001. Accordingly, judgment shall enter in favor of Plaintiffs and against Defendants on their fourth claim for attorneys' fees pursuant to 42 U.S.C. § 1988.

III. CONCLUSION

Based upon the foregoing, it is

ORDERED that the Clerk of the Court shall enter judgment in favor of Plaintiffs and against Defendants on the first claim for relief based on a violation of the Free Speech Clause of the First

Amendment. It is

FURTHER ORDERED that, consistent with the above, Plaintiffs' request in the first claim for declaratory and injunctive relief is GRANTED consistent with this Order. Specifically, as to the injunctive relief, Defendants are ordered by November 4, 2001, to: (1) provide an opportunity and place for Mr. and Mrs. Fleming to paint the tiles they wished to paint but were precluded from painting; and (2) mount the tiles painted by the Petrones and Rohrbough that are at issue in this case. It is

FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Defendants and against Plaintiffs on the second claim for relief for a violation of Article II, Section 10 of the Colorado Constitution. It is

FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Defendants and against Plaintiffs on the third claim for relief for a violation of the Establishment Clause of the First Amendment. It is

FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Defendants Tori Merritts and Debby Oberbeck, who are sued in their officials capacities, on all claims. It is

FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Defendant Jon DeStefano as to all claims asserted against him in both his official and individual capacities.

FURTHER ORDERED that the Clerk of Court shall enter judgment in favor of Plaintiffs and against Defendants on the fourth

claim for relief since the Court has awarded Plaintiffs reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. It is

FURTHER ORDERED that Plaintiffs shall file a statement of their attorneys' fees with thirty (30) days of October 15, 2001, or by November 14, 2001. Finally, it is

ORDERED that judgment shall be entered nunc pro tunc to October 15, 2001, the date this ruling was first announced by the Court.

DATED at Denver, Colorado, this 1st day of November, 2001.

BY THE COURT:

/s/
Wiley Y. Daniel
U.S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 99-D-1932

DONALD F. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE, (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend, Richard P. Petrone,

Plaintiffs,

v.

JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a Colorado Quasi-Municipal Corporation, and JON DeSTAFANO, individually and in his official capacities

Defendants.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued November 1, 2001, are hereby AMENDED as follows:

1) In connection with the First Claim for Relief, judgment shall be entered in favor of Plaintiffs and against Defendant Jefferson County School District R-1 only, since Plaintiffs did not prevail on their claims against the individual Defendants.

2) Also in connection with the First Claim for Relief, the injunctive relief shall also include an order that Defendants mount on the walls of Columbine High School the tiles painted by Mr. and Mrs. Fleming after they have been given the opportunity to paint the tiles they wished to paint but were precluded from painting.

3) In connection with the fourth claim for relief for attorneys' fees under 42 U.S.C. § 1988, judgment shall be entered in favor of Plaintiffs and against Defendant Jefferson County School District R-1 only, since Plaintiffs did not prevail on their claims against the individual Defendants.

DATED at Denver, Colorado, this 6th day of November, 2001.

BY THE COURT:

/s/
Wiley Y. Daniel
U.S. District Judge

F1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-CU-1932

DONALD F. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend, Richard P. Petrone.

Plaintiffs,

v.

JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a Colorado Quasi-Municipal Corporation, and JON DeSTEFANO, TORI MERRITS, DAVID R. DiGIACOMO, DEBBY OBERBECK, and VINCE CHOWDHURY, individually and in their official capacities.

Defendants.

COMPLAINT

COME NOW the Plaintiffs, Donald F. Fleming, Diedra A. Fleming, Lisa M. Maurer, Brian E. Rohrbough, Susan A. Petrone, Richard P. Petrone, and Nicole M. Petrone, by and through their attorneys, Arrington & Rouse, P.C., affiliated attorneys with The Rutherford Institute, and for their complaint against the Defendants state and allege as follows:

NATURE OF CASE

1. This is an action brought pursuant to 42 U.S.C. §§1983 and 1988 for violation of their First and Fourteenth Amendment rights under the United States Constitution, and pendent State claims as enumerated hereinafter, resulting from the Defendants' refusal to allow Plaintiffs to honor their slain children in a public forum at Columbine High School because of the religious nature of their speech.

JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343(a)(3) and 1343(a)(4) which provide for original jurisdiction in this Court of all suits brought pursuant to 42 U.S.C. §1983. Jurisdiction is also conferred on this Court by 28 U.S.C. §1331 because the cause of action arises under the Constitution and laws of the United States.

3. Independent of any Federal causes of action, this Court has pendent jurisdiction of Plaintiffs' claims arising under the Constitution of the State of Colorado.

4. Venue properly lies in the District of Colorado pursuant to 28 U.S.C. §1391 in that all Defendants reside in this Federal district.

PARTIES

5. Plaintiffs Diedra A. Fleming (hereinafter referred to as "Mrs. Fleming") and Donald F. Fleming (hereinafter

referred to as "Mr. Fleming") are residents of Jefferson County, Colorado. Their daughter, Kelly Fleming, was a student at Columbine High School.

6. Plaintiff Lisa M. Maurer (hereinafter referred to as "Ms. Maurer"), is a resident of Park County, Colorado. She is a friend of Brian E. Rohrbough and was a friend of Brian E. Rohrbough's son, Daniel Rohrbough.

7. Plaintiff Brian E. Rohrbough (hereinafter referred to as "Mr. Rohrbough"), is a resident of Jefferson County, Colorado. His son, Daniel Rohrbough, was a student at Columbine High School.

8. Plaintiff Susan A. Petrone (hereinafter referred to as "Mrs. Petrone") was the mother of Daniel Rohrbough. Plaintiff Richard P. Petrone (hereinafter referred to as "Mr. Petrone"), is Mrs. Petrone's current husband. The Petrones are residents of Jefferson County, Colorado.

9. Plaintiff Nicole M. Petrone (hereinafter referred to as "Miss Petrone"), a minor child, is a resident of Jefferson County, Colorado, and was at all times pertinent hereto a Columbine High School student. Miss Petrone was the step-sister of Daniel Rohrbough, and her father is Mr. Petrone.

10. Defendant Jefferson County School District No. R-1 (hereinafter referred to as the "School District"), describes itself as a quasi municipal corporation, and is a school district formed and organized pursuant to the laws of the State of Colorado. The School District operates numerous

primary and secondary public schools in Jefferson County, Colorado. Among the schools operated by the School District is Columbine High School.

11. Defendants Jon DeStefano (hereinafter individually referred to as "Mr. DeStefano"), Tori Merrits, David R. DiGiacomo, Debby Oberbeck, and Vince Chowdhury (hereinafter collectively referred to as the "School Board") were at all times material hereto the duly elected and acting School Board for the School District. Mr. DeStefano was at all times material hereto the President of the School Board for the School District.

FACTS

12. Daniel Rohrbough and Kelly Fleming were students at Columbine High School in April of 1999.

13. On April 20, 1999 two gunmen entered the premises of Columbine High School and shot numerous students and teachers before committing suicide.

14. A total of 12 students and one teacher were killed by the gunmen, including Daniel Rohrbough and Kelly Fleming. Numerous other students and teachers were wounded in the attack on Columbine High School.

15. For several years prior to the attack on Columbine High School, the School District had allowed students to express themselves by means of painting ceramic tiles and placing them above the lockers in the hallways of Columbine High School.

16. Prior to the attack on Columbine High School there were hundreds of tiles in place over the lockers in the hallways of Columbine High School. Said tiles contained numerous pictorial messages and expressions on a wide range of beliefs and issues.

17. In the wake of the attack on Columbine High School, the School Board appointed an individual by the name of Barbara Monseu to act as its liaison with the parents of students slain in the attack on Columbine High School.

18. Subsequent to the attack on Columbine High School, the School District and School Board, acting through their employees and/or agents, invited the parents, siblings, and friends of slain and wounded Columbine students, including Plaintiffs herein, to paint tiles expressing their feelings regarding the shooting at Columbine High School, which tiles would be placed with other tiles above the lockers in the hallways of Columbine High School. The School District and School Board also invited police officers, fire fighters, and other rescue personnel who responded to the shooting at Columbine High School, and incoming freshmen students and graduated seniors, to also paint tiles to be placed above the lockers in the hallways of Columbine High School.

19. The Plaintiffs were told by Barbara Monseu, the School Board's official liaison, that although they could express themselves via the medium of ceramic tiles placed in the school hallways, they could not place dates, names of their slain children, initials, or religious symbols on their tiles

because of fear of a lawsuit by the American Civil Liberties Union. The School District and School Board did not place restrictions on any other type of speech.

20. Parents of slain Columbine students, including Plaintiffs, objected to the restrictions on their speech and some of the Plaintiffs painted tiles with religious symbols, names of their slain children, initials, and/or dates, as set forth hereinafter. Plaintiffs' tiles were either never put up, or were put up and subsequently taken down, because of the religious symbols and messages on the tiles.

21. Plaintiffs are informed and believe and therefore allege that some or all of the tiles painted by Plaintiffs, and other parents, siblings, and friends of slain Columbine students were in fact installed randomly in the hallways at Columbine High School, along with tiles prepared by other persons.

22. Defendant Jon DeStefano specifically told Mr. Rohrbugh, Mrs. Petrone, and Mr. Petrone that he "personally had a problem with religious symbols being painted on the tiles" and that Plaintiffs would not be allowed to paint tiles with religious symbols and have them placed among the other tiles displayed at Columbine High School.

23. Plaintiffs are informed and believe and therefore allege that subsequent to the installation of the tiles, the School District ordered a search made for tiles with religious symbols. Tiles with religious symbols were then sought out, marked, and chiseled out of the walls at Columbine High School, including tiles with religious symbols and/or messages that had been in place in the hallways of Columbine High

School for some time prior to the attack on Columbine High School. Among the tiles so marked and removed were tiles prepared by one or more of the Plaintiffs which contained religious symbols and/or religious messages.

24. The tiles each measured approximately 4 inches square. One of Mr. Rohrbough's tile contained 13 crosses, symbolic of the twelve students and one teacher slain at Columbine High School during the shooting spree. His other tile contained the words "[T]here is NO PEACE SAYS the LORD FOR The WICKED", a message taken from the book of Isaiah. Chapter 48, Verse 22 in the Old Testament. Mr. Rohrbough's tiles are the top two tiles shown on Exhibit "1" attached hereto.

25. Ms. Maurer also painted two tiles. One tile contained a mauve cross in the center with the words "JESUS CHRIST IS LORD". Her second tile contained a mauve cross with a heart, the Christian fish symbol, and a hill with three crosses. Ms. Maurer's tiles are the bottom two tiles shown on Exhibit "1" attached hereto.

26. Mrs. Petrone's tile contained a heart with a cross in the middle of the heart with her son Daniel's name on it. Mrs. Petrone's tile is shown in the top right hand corner of Exhibit "2" attached hereto. Mr. Petrone painted two tiles. His first tile contained the word "DAN" and depicted Daniel Rohrbough rising to heaven with a glowing halo around his head. Mr. Petrone's second tile contained a mauve cross with the letters "LOVE", with a peace symbol in the center of the "O". Mr. Petrone's tiles are shown at the bottom of Exhibit "2" attached hereto.

27. Miss Petrone painted a tile with a red heart and a red rose with a green stem, with the words, "Danny Rohrbough" and the initials "NP". Superimposed on the stem of the rose was a small yellow cross, approximately one inch high. Miss Petrone's tile is one of those put up in the hallway and then subsequently removed. Miss Petrone's tile is shown in the upper left hand corner of Exhibit "2" attached hereto.

28. Mr. and Mrs. Fleming wanted to paint tiles with religious symbols, but did not do so because they were told by agents and/or employees of the School District that they would not be allowed to do so. Instead, they both painted tiles without religious symbols.

29. The decision to not allow preparation of tiles with religious symbols, names of slain children, initials, and/or dates, and the subsequent decision to remove tiles containing religious symbols was made by the School Board. These decisions were the official policy of the School District as enacted by the School Board. Subsequent to the removal of the tiles with religious symbols and/or messages, the Defendants offered to let the Plaintiffs and the parents of slain students paint new tiles with names, dates and/or initials as memorials to the slain students, but still prohibited Plaintiffs and other parents of slain students from making and displaying any tiles with religious symbols and/or religious messages. Only religious symbols and/or religious messages were excluded by the Defendants pursuant to their revised policy.

FIRST CLAIM FOR RELIEF

(Violation of First Amendment - Free Speech Clause)

30. Plaintiffs restate the allegations contained in paragraphs 1-29, as if fully set forth herein.

31. By allowing students, incoming freshmen, graduated seniors, parents, siblings and friends of slain and wounded students, police officers, fire fighters, and other rescue personnel to prepare tiles and place them in the hallways of Columbine High School the Defendants voluntarily opened a designated public forum.

32. The Defendants imposed improper content-based regulations upon speech in said designated public forum, to wit: no religious symbols or religious speech of any kind. This content based restriction was based upon the viewpoint expressed by the speakers as well as the content of the speech expressed by the speakers.

33. The content-based regulation imposed by Defendants was not narrowly drawn to effectuate any compelling state interest. The content-based regulation was not a reasonable time, place or manner regulation, and constituted an unlawful prior restraint on Plaintiffs' speech.

34. As a result, Defendants acting under color of state law have violated Plaintiffs' rights to free speech pursuant to the First Amendment to the United States Constitution.

35. The First Amendment is made applicable to Defendants

pursuant to the Fourteenth Amendment to the United States Constitution.

36. Alternatively, in the event that the Court should rule that the Defendants did not open a designated public forum, Plaintiffs allege that the Defendants opened a limited public forum within a closed forum, that being the display of tiles within Columbine High School.

37. The restrictions placed by Defendants upon Plaintiffs' speech in said limited public forum, to wit: no religious symbols or expression on the tiles, is content and viewpoint based regulation.

38. The viewpoint and content based restrictions on Plaintiffs' speech are not reasonable in light of the purpose served by the limited public forum and are not viewpoint neutral.

39. As a result, the Defendants have violated Plaintiffs' free speech rights pursuant to the First Amendment to the United States Constitution.

40. Plaintiffs are entitled to declaratory relief from this Court to the effect that Defendants created a designated public forum, that the regulations barring religious symbols and messages on the tiles are a form of content and or viewpoint-based discrimination, and that said regulations are not narrowly drawn to serve a compelling government interest, and that by imposing such restrictions under color of state law the Defendants have violated Plaintiffs' First Amendment Free Speech rights. In the alternative, should this Court determine that Defendants did not open a

designated public forum at Columbine High School, Plaintiffs are entitled to an order of this Court declaring that the Defendants opened a limited public forum within a closed forum, that the regulations imposed upon Plaintiffs speech are not viewpoint or content neutral, that such regulations are not reasonable in light of the purpose served by the forum, and that by imposing such regulations under color of state law the Defendants violated Plaintiffs' rights to free speech pursuant to the First Amendment to the United States Constitution.

41. Further, Plaintiffs are entitled to preliminary and permanent injunctive relief prohibiting the Defendants from violating Plaintiffs' First Amendment free speech rights by prohibiting them from placing tiles with religious symbols and messages alongside other tiles in the hallways of Columbine High School.

SECOND CLAIM FOR RELIEF

(Violation of Free Speech rights, Colorado Constitution Article II, Section 10)

42. Plaintiffs restate the allegations contained above in paragraphs 1-41, as if fully set forth herein.

43. Article II Section 10 of the Colorado Constitution provides protection for free speech than does the First Amendment to the United States Constitution.

44. In the event that the Court finds that the Defendants did not violate Plaintiffs' free speech rights under the First

Amendment to the United States Constitution, this Court should exercise its pendent jurisdiction and determine that, based upon the facts, the Defendants violated Plaintiffs' free speech rights under Article II Section 10 of the Colorado Constitution.

45. The speech in which Plaintiffs sought to engage, to wit: the painting of religious symbols and messages on ceramic tiles to be displayed with other tiles in the hallways of Columbine High School, can be tolerated by the community.

46. Since the community can tolerate the speech which Plaintiffs sought to engage in, the Defendants denial of the right to engage in such speech and the removal of tiles painted by the Plaintiffs and others with religious symbols, and/or failure to place such tiles in the hallways of Columbine High School along with other tiles, amounts to a violation of Article II Section 10 of the Colorado Constitution.

47. Plaintiffs are entitled to an Order of this Court, declaring that the Defendants' refusal to allow placement of tiles with religious symbols and/or religious messages, and/or the removal of such tiles, is content and viewpoint based regulation and discrimination, that the community could tolerate the expression which Plaintiffs sought to engage in, and that by disallowing Plaintiffs' speech on the basis of its religious content and/or viewpoint Defendants violated the Plaintiffs' free speech right pursuant to Article II Section 10 of the Colorado Constitution.

48. Plaintiffs are entitled to preliminary and permanent injunctive relief from this Court prohibiting the Defendants from continued violation of their free speech rights pursuant to Article II Section 10 of the Colorado Constitution by refusing to allow them to place their tiles along with other tiles in the hallways of Columbine High School.

THIRD CLAIM FOR RELIEF

(First Amendment-Establishment Clause Violation)

49. Plaintiffs restate the allegations contained above in paragraphs 1-48, as if fully set forth herein.

50. The restrictions placed upon Plaintiffs by the Defendants and the refusal of Defendants to allow the Plaintiffs to place tiles with religious symbols and/or messages alongside other tiles in Columbine High School, all done under color of state law, sends a message of exclusion and disfavor of religion.

51. By excluding religion and religious expression from the forum opened by Defendants, Defendants have exhibited the type of hostility toward religion that amounts to a violation of the establishment clause of the First Amendment.

52. Plaintiffs are entitled to an Order of this Court declaring that the regulations imposed by Defendants barring religious symbols and/or messages amounts to an expression of disfavor for religion and hostility to religion, all in violation of the establishment clause of the First Amendment to the

United States Constitution.

53. Plaintiffs are entitled to preliminary and permanent injunctive relief from this Court prohibiting the Defendants from continued violation of the Establishment Clause of the First Amendment to the Constitution of the United States by refusing to allow them to place their tiles along with other tiles in the hallways of Columbine High School.

FOURTH CLAIM FOR RELIEF

(First Amendment-Free Exercise Clause)

54. Plaintiffs restate the allegations contained above in paragraphs 1-53, as if fully set forth herein.

55. Pursuant to the Free Exercise Clause of the First Amendment to the United States Constitution Plaintiffs have a fundamental right to engage in religious practices and to express their religious beliefs.

56. The religious beliefs of the slain students, Daniel Rohrbough and Kelly Fleming, were an integral part of who they were, their lives, and their presence at Columbine High School.

57. Plaintiffs feel that they have a religiously based duty and obligation to share that information with others.

58. Plaintiffs sought to share the importance of religion in their children's lives and the impact that religion had on them in the context of displaying religious symbols and messages on tiles to be placed with other tiles in the hallways of

Columbine High School.

59. By refusing to allow Plaintiffs to exhibit tiles that contain religious symbols or religious messages Defendants, acting under color of state law, have unlawfully interfered with Plaintiffs' First Amendment Rights to the free exercise of their religion and their religious beliefs.

60. Plaintiffs are entitled to an Order of this Court declaring that Defendants, by excluding Plaintiffs tiles with religious symbols and or messages have violated Plaintiffs rights to the free exercise of religion as protected by the First Amendment to the United States Constitution.

61. Plaintiffs are entitled to preliminary and permanent injunctive relief prohibiting the Defendants from continuing to violate their rights pursuant to the Free Exercise Clause of the First Amendment to the United States Constitution and prohibiting the Defendants from continuing to deny Plaintiffs the right to place their titles with religious symbols and/or messages alongside other tiles in the hallways of Columbine High School.

FIFTH CLAIM FOR RELIEF

(42 U.S.C. §1988-Attorneys Fees)

62. Plaintiffs restate the allegations contained above in paragraphs 1-61, as if fully set forth herein.

63. 42 U.S.C. §1988 provides for an award of costs and attorney fees to prevailing Plaintiffs in actions brought

pursuant to 42 U.S.C. §1983.

64. Plaintiffs are entitled to an Order of this Court awarding them their costs and attorney fees incurred in having had to bring this action.

WHEREFORE, Plaintiffs respectfully request that this Court enter an Order granting them the declaratory and injunctive relief requested above, and awarding them their costs and attorneys fees for having had to bring this action.

DATED this 4th day of October, 1999.

ARRINGTON & ROUSE, P.C.

By:_____/s/_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 99-D-1932

DONALD FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE (individually), and NICOLE M. PETRONE, a minor child, by and through her father and next friend, Richard P. Petrone,

Plaintiffs,

v.

JEFFERSON COUNTY SCHOOL DISTRICT NO. R-1, a Colorado Quasi-Municipal Corporation and JON DeSTEFANO, TORI MERRITS, DAVID R. DiGIACOMO, DEBBY OBERBECK, and VINCE CHOWDHURY, individually and in their official capacities.

Defendants

ANSWER

The Defendants, Jefferson County School District No. R-1, a Colorado Quasi-municipal Corporation, and Jon DeStefano, Tori Merrits, David R. DiGiacomo, Debby R. DiGiacomo, Debby Oberbeck, and Vince Chowdhury, individually and in their official capacities (collectively referred to as "Defendants"), by their attorneys, Caplan and Earnest LLC, for their Answer, state as follows:

1. Answering paragraph 1, Defendants admit that this action is alleged pursuant to 42 USC §§1983 and 1988 for violation of Plaintiffs' First and Fourteenth Amendment rights under the United States Constitution and pendant state claims and deny all other averments therein.

2. Defendants admit the averments in paragraph 2.

3. Defendants deny the averments in paragraph 3.

4. Defendants admit the averments in paragraphs 4 through 5, inclusive.

5. Defendants are without sufficient knowledge or information to form a belief as to the truth of the averments in paragraph 6 and, therefore, deny the same.

6. Defendants admit the averments in paragraphs 7 through 10 inclusive.

7. Defendants admit the averments in paragraph 11 with respects to Defendants Jon DeStefano, Tori Merritts, and Debbie Oberbeck. Defendants further admit that Defendants David R. DiGiacomo and Vince Chowdhury were members of the Board of Education up to November 11, 1999. Defendants affirmatively state that on November 11, 1999, Karen Litz and Michael Wade, assumed the seats on the Board formerly held by Mr. DiGiacomo and Mr. Chowdhury.

8. Defendants admit the averments in paragraphs 12 through 14 inclusive.

9. Answering paragraph 15, Defendants state that, as part of curricular art classes, some students made four-inch painted ceramic tiles ("tiles") under the direction of art teachers, some of which tiles were attached to the hallway walls of Columbine High School and deny all other averments therein.

10. Answering paragraph 16, Defendants admit that prior to the incidents of April 20, 1999, numerous tiles were attached to the hallway walls of Columbine High School as decorations and deny all other averments therein.

11. Answering paragraph 17, Defendants admit that Barbara Monseu served as a liaison to the parents of students slain in the attack on Columbine High School and deny all other averments therein.

12. Answering paragraph 18, Defendants admit that subsequent to the incidents on April 20, 1999, representatives of Columbine High School provided opportunities for Columbine High School students, their families, and others, such as incoming students, police officers, firefighters, and other rescue personnel who responded to the incidents at Columbine High School, to prepare tiles in accordance with school directives as to content, design, and colors to be attached to the hallway walls of Columbine High School after its renovation as decoration. Defendants deny all other averments in paragraph 18.

13. Answering paragraph 19, the School District admits that

the Plaintiffs and all other persons participating in preparing tiles were given clear directives by school representatives, including Barbara Monseu, concerning the content of the tiles, including directives that all designs were to be abstract, that the tiles were not intended to memorialize the incidents of April 20, 1999, and that the tiles were not to include words, recognizable symbols, names, letters or initials, or dates. The School District denies all other averments in paragraph 19.

14. Answering paragraph 20, Defendants admit that some of the Plaintiffs objected to the school directives concerning the content of tiles; that some of the Plaintiffs painted tiles that included names of their slain children, religious and other recognizable symbols, non-abstract illustrations, and words; that Plaintiffs were informed that because they did not comply with the school directives, such tiles would not be attached to the Columbine High School hallway walls; and that the tiles identified in the Complaint were not attached to the Columbine High School hallway walls or were attached without the knowledge of school decision-makers and subsequently removed because they were not in accordance with the school directives. Defendants deny all other averments in paragraph 20.

15. Answering paragraph 21, Defendants admit that some tiles prepared by Columbine High School students, their family members, and others were attached to the hallway walls at Columbine High School were attached without the knowledge of school decision-makers and subsequently removed because they were not in accordance with the school directives. Defendants deny all other averments.

16. Defendants deny the averments in paragraph 22.

17. Answering paragraph 23, Defendants admit that a number of tiles were attached to the hallway walls of Columbine High School by volunteers, including some tiles that were not in accordance with the school directives as to content and that approximately 136 tiles were subsequently removed from those walls by school personnel. Defendants deny all other averments in paragraph 23.

18. Answering paragraph 24, Defendants admit that the tiles measure approximately four inches by four inches. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in the remainder of paragraph 24 or in paragraphs 25 through 28 inclusive, and, therefore, deny the same.

19. Answering paragraph 29, Defendants admit that the parents of slain children were excused from some of the school directives regarding the preparation of tiles, and that some of these tiles were displayed in the hallway walls of Columbine High School, but that tiles with religious messages and symbols still were not displayed. Defendants deny all other averments in paragraph 29.

20. Answering paragraph 30, Defendants incorporate the averments in paragraphs 1 through 19, inclusive, hereinabove.

21. Answering paragraphs 31 through 34 inclusive, the statements made therein are legal conclusions which the

Defendants deny.

22. Defendants admit the averments in paragraph 35.

23. Answering paragraphs 36 through 41 inclusive, the statements made therein are legal conclusions which the Defendants deny.

24. Answering paragraph 42, Defendants incorporate the averments in paragraphs 1 through 23, inclusive, hereinabove.

25. Answering paragraphs 43 through 48 inclusive, the statements made therein are legal conclusions which the Defendants deny.

26. Answering paragraph 49, Defendants incorporate the averments in paragraphs 1 through 25, inclusive, hereinabove.

27. Answering paragraphs 50 through 53 inclusive, the statements made therein are legal conclusions which the Defendants deny.

28. Answering paragraph 54, Defendants incorporate the averments in paragraphs 1 through 27, inclusive, hereinabove.

29. Answering paragraph 55, the statements made therein are legal conclusions which the Defendants deny.

30. Defendants are without knowledge or information sufficient

to form a belief as to the truth of the averments in paragraphs 56 through 58, inclusive, and therefore deny the same.

31. Answering paragraphs 59 through 61 inclusive, the statements made therein are legal conclusions which the Defendants deny.

32. Answering paragraph 62, Defendants incorporate the averments in paragraphs 1 through 31, inclusive, hereinabove.

33. Defendants admit the averments in paragraph 63.

34. Answering paragraph 64, the statements made therein are legal conclusions which the Defendants deny.

35. Defendants deny all averments in the Complaint not specifically admitted hereinabove.

AFFIRMATIVE DEFENSES

36. The Complaint fails to state a cause of action on which relief can be granted.

37. The claims against the individual defendants are barred by qualified immunity.

38. The Court should not exercise supplemental jurisdiction over the Plaintiffs' claim predicated on the Colorado Constitution.

WHEREFORE, Defendants request the Court to enter an order granting judgment in favor of the Defendants, dismissing the Complaint with prejudice, awarding Defendants their costs of defense, including attorneys' fees, and for such other relief as the Court deems proper.

Dated this 6th day of April, 2000.

Respectfully submitted,

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EXCERPTS OF TRANSCRIPT OF TRIAL TO COURT, OCTOBER 10, 2001

Plaintiff Diedre Fleming

[75] [Mr. Rouse]

Q. Are you one of the plaintiffs in this case, Mrs. Fleming?

A. Yes, I am.

Q. In April of 1991 (sic) was anyone in your family attending Columbine High School?

A. My youngest daughter Erin. Or Kelly, I'm sorry, it was.

Q. Did anything out of the ordinary happen to Kelly Fleming at Columbine High School on April 20, 1999?

A. Kelly was murdered in the library.

Q. After your daughter's death, did you become aware of an activity at Columbine High School called the painting, tile-painting activity?

A. Yes, I did.

Q. How did you become aware of that?

A. I don't recall exactly how I heard about it. But was made aware that I was, family members were able to go and paint tiles in memory of their loved ones.

[76]

Q. Did you in fact go to Columbine High School to paint tiles?

A. Yes, I did.

Q. When did you go?

A. July 19.

Q. Of what year?

A. 1999.

* * * *

Q. When you were there, did you see any written instructions [77] or rules for painting the tiles?

A. No.

Q. Were you given any written instructions or rules for painting the tiles?

A. No, I was not.

Q. Did anyone tell you how to go about making a tile?

A. Not specifically. I was just kind of taken to a table and shown that here's your paints and your brushes and once they're fired, they will change colors and that you could just sit down and paint.

Q. Did anyone tell you what you could or couldn't paint on your tiles?

A. After I sat down, I became aware that there were certain restrictions and that we were not to put the Columbine ribbon, we couldn't reference any – I couldn't put Kelly's name on it, and no religious symbols, and the date 4-20-99, was not allowed.

* * * *

Q. When you went to the tile-painting session, did you know what type of tile you wanted to paint? [78]

A. Yes.

Q. And what did you want to paint?

A. I, myself, wanted to paint a tile that says 4-20-99, Jesus Wept.

Q. How did you feel when you found out about the restrictions?

A. I just felt deflated. I was crushed that I couldn't paint what I had come there to paint.

Q. Why did you want to paint that particular tile?

A. For me, God was a very important part of that date. And Jesus wept, for me, stated that he, along with the rest of the world, stood there at the horror that happened that day and he wept.

Q. Did you in fact paint a tile while you were there?

A. I did. When I found out I couldn't paint that one, I wanted to leave something of Kelly behind.

Q. What did you in fact paint?

A. I ended up painting a tile, it had a peace sign and a dove in the middle, and then I also painted a tile, I believe it was a tree with some birds; and at some point, somebody walked by and they – 'cause I was so frustrated that I couldn't put any reference to anything that had to do with April 20 – they said, Go ahead and put her name on it, we'll get it up.

* * * *

[80]

Q. Did you in fact go back and paint another tile?

A. Yes, I did.

* * * *

Q. Do you know what happened to the tiles that you painted?

A. The night I went back to paint the third tile, I did see the tile that had the peace sign and the dove on it. It was in a box. I've never seen it since then, and I've never seen the other two.

Q. Did anybody ever offer to give you your tiles back? [81]

A. Not that I recall.

Barbara Hirokawa

[110]
Q. What is shown in photo 0931?

A. That's a number of younger kids, two of them are grandsons, I don't know who the other ones are.

Q. Were they at the tile-painting session on the morning of the 19th?

A. Yes. What happened is a lot of the freshmen and sophomores couldn't drive and so their parents would drive them over and they would have younger brothers and sisters, and so we told them all they could make tiles.

Q. So the tile painting that morning was not limited strictly will to Columbine High School. No?

A. We didn't even ask for Ids when people came in.

Q. Do you know who these two women are in photo 0931.

A. One of them, I think on the right is a student. The other one, no, I don't know who she is.

Q. You don't recognize her as a teacher?

A. No, I don't know – no, they're not teachers. [111]

Q. All right. What do the photos on page 4 of Plaintiff's Exhibit 10 show?

A. These are from the alumni picnic that we had on July 25. I'm sorry, I don't know if it's the 24th or 25th now. It was a Sunday.

Q. And was that picnic at Columbine High School?

A. No. It was at Columbine Knolls Park.

Q. Now, was that restricted to alumni painting, or could somebody else paint tiles?

A. Anybody who showed up painted a tile. Again, we didn't ask for IDs. It was parents, alumni, their kids, grandkids. Neighbors.

[121]

Q. Now, I noticed in these paragraphs [sic], in many of these photographs, up at the top of the wall, near the ceiling, there seems to be some papers or pages with photographs and print. Do you see what I'm looking at?

A. Right.

Q. What is that?

A. That's an art history time line.

Q. Explain what that is, please?

A. Well, it goes through all of the ages since the beginning of art. And it has photographs of artworks from different times and, you know, dates and writing below explaining what it is.

Q. Are there in fact – there's some religious artwork in those photographs?

A. Yes, there is because that's what art was up until about 1700s. It was almost all religious. Various religions.

* * * *

[122]
Q. And is the history of art – how long was it up there?

A. As far as I know, it's still up.

[124]
Q. Now, how did you determine if something was a religious symbol and shouldn't be painted?

A. Anything that was an obvious religious symbol. Angels, kids were trying to do angels in the morning, crosses. If we had had any stars of David or anything like that, we would [125] eliminated those, too.

Q. What sort of thing did you consider an obvious Christian symbol, for example?

A. Cross.

Q. Anything else?

A. Angels.

Q. What about the Christian fiche [sic] symbol, or do you know what I mean by the Christian fish symbol?

A. We didn't think of that at first, but it was – it was not – you know, it was something that was recognizable, so we were saying, youknow, do designs. I don't remember running across that at that particular day or at least in the morning when I was helping the kids.

Q. All right. So you could not paint, for example, a star of David?

A. Right.

Q. And what is a star of David? Can you describe it?

A. It's a six-pointed star.

Q. Okay, so a five-pointed star was okay, was it not?

A. Probably. It's a design element, you know, design shapes, circle, square, star, rectangle, diamond.

[128]

Q. Let's look at page 2 of Exhibit 1, the tile, the upper portion of that page. Is that a tile that was not allowed to be put up on the wall?

A. I know what these tiles are. You just want me to answer

the question straight?

Q. Well, yeah.

A. Yes.

Q. And why not?

A. Because there's crosses on a hill.

Q. If there had been trees on a hill, you wouldn't have had problems with it?

A. Yes. Because the crosses came to stand for not just the – this happens to be three which is a representation of the crucifixion, but also with the crosses on Rebel Hill.

Q. So if there had been three trees on the hill, you wouldn't have had a problem with that?

A. Probably not.

[133]
Q. The Rohrboughs and Petrones were not the only ones that painted tiles with religious symbols, were they?

A. No.

Q. In fact, there were quite a number of tiles with religious symbols that got painted on the 19th, were there not?

A. You mean by the parents that afternoon?

Q. By anybody.

A. Like I said, I don't know exactly because there were too many to keep track of in the morning. There were some, and we either changed them or washed them off or – if we caught them.

[141]
Q. What were the specific things that you recall being told were not to be allowed [at the July 19, 1999 tile painting session]?

[142]
A. Well, I don't know what I was told, because I had made the guidelines to begin with. But the things that we emphasized then, because there were a lot of religious expression coming out in my classes at Chatfield, and that was okay, but we did not want the permanent installation in the school to be a reminder of April 20, and we knew, you know, we wanted to continue what we had been doing before, which was, you know, symbols. And so we had to kind of emphasize that angels and crosses and crosses and things like that still weren't going to be allowed. And definitely not anything with the dates and names. Now, as I told Mr. Rouse, we did relent and let them do Columbines.

[147]
Q. In your own mind, do you make a distinction between that mobile and its appearance and contents and the tile project?

A. Yes. Because it wasn't a permanent exhibit. It was just up temporarily.

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Barbara Monseu

[MR. ROUSE] [160]
Q. And how did you first hear about the tile project?

A. I received a phone call from Liz Keating asking if they – it would be an appropriate activity for them to have students continue a project that had been started earlier where they would design tiles that would be affixed to the interior of the building, in the hallways, as a permanent art project for the school. And their purpose was to bring students together to create something for the building.

Q. Were you told that it was going to be part of the healing process?

A. They said it was going to be one of the activities that they were doing to bring students together. Healing process was used in many nomenclatures. We were talking about all of the things that we could do to bring students back into the school building and feel safe and involve them in their school [161] again, make them feel comfortable. I mean they had been very afraid. There were a lot of issues that they were dealing with, and so many people were involved in creating activities that would help students return to the school.

THE COURT: You didn't answer the question. The question was was this activity a part of the healing process.

THE WITNESS: There were – it was at times referred to being part of the healing process. One of the activities that would make students feel better about returning to the school.

THE COURT: So the answer is yes.

THE WITNESS: Yes.

* * * *

[164]

Q. Do you know what Exhibit 8 is.

A. Yes, I do.

Q. Can you tell me what it is, please?

A. It's a note that I made outlining the criteria that we would use for the tiles with a note, handwritten note, explaining what guidelines and what we would do with tiles that didn't fit within the guidelines.

Q. And when did you make that note?

A. I'm sorry?

Q. When did you make the note?

A. I don't remember the date that I wrote the note. It was sometime following the phone call that I received asking for that – if the tiles activity could be started and when they were starting the project.

Q. All right. Was it made at the time that you talked to Liz Keating and Barb Hirokawa?

A. Probably was following that and then was forwarded on to them.

Q. Was this your initial thoughts on the – on what the restrictions should be?

A. This is following those initial thoughts, and then I had conversations with other people to see if there were any other [165] criteria that we should add.

Q. These were your initial criteria, correct?

A. That's correct.

Q. And prior to writing these down, had you consulted with anybody?

A. No. But I did consult with people after I had given the original criteria.

Q. All right. Now, at the top of your list is "no religious symbols," correct?

A. That is correct.

Q. Now, did you discuss these guidelines with anyone in the Jefferson County schools administration?

A. Yes, I did.

Q. And who did you discuss it with?

A. We had a group that met on a regular basis that was comprised of the superintendent, the deputy superintendent, the assistant superintendent, communications, a person from our counseling department that works with counselors and mental health professionals. And occasionally district counsel.

Q. I think this meeting, you said the superintendent was there, also?

A. Yes.

Q. Was the superintendent advised of the nature of the tile project and the restrictions you wanted to put on it? [166]

A. Yes.

Q. Did you ever advise the school board of the project and the restrictions?

* * * *

[167]

BY MR. ROUSE:

Q. You can read lines 11 through 19, please? [Of witness's deposition]

A. I left a voice mail message for the school board telling them that there was going to be a tile project and that it was part of the healing process and that different community groups, student groups, would be coming together, community meetings, students, communities, and their families and the alumni would be coming together and they'd have an opportunity to make a tile. And I

believe I said here are the guidelines that we set forth and if you have any questions, you can call and ask.

* * * *

[176]

Q. Do you recall having your deposition taken, correct?

A. I do.

Q. And you were asked the question, you know, how was the whole tile project supposed to help in the healing process. Do you remember discussing that?

A. I do.

THE COURT: Counsel, refer her to the page and line.

BY MR. ROUSE:

Q. Page 71, starting on line 25. Where it says, You say it was supposed to help in the healing process, the whole tile project was supposed to help in the healing process. How was that.

What was your response?

A. For some people the act of creating something as a remembrance or as a making something is a way that helps them get over or is something that helps them move forward or is something that's valuable to them.

Q. Was there some resolution of the issue at that meeting?

A. I would not say that it was a complete resolution. At that

meeting we talked about the families being able to come together and make tiles and that we would be allowing them to make a tile for – a specific tile for their child and include their child's name, dates other than April 20, if they wanted to include a birth date. They had asked if they would be able to include a ribbon, and we said that that would be acceptable. We discussed the fact that it was something, a positive thing that they could do. We wanted to keep it on the positive side. And again, we emphasized that there would be no religious symbols.

Q. All right. So let me see if I understand this. After September 9, 1999, the families were free to put their child's name on a tile?

A. That is correct.

Q. They were free to put the child's initials on a tile?

A. That is correct.

Q. They were free to use a Columbine ribbon?

A. That is correct.

[184]

Q. But it's your recollection that they were not free to use the date 4-20-99.

A. Correct.

Q. And it was supposed to be a positive remembrance. What does that mean?

A. That it would be something that they could put in the building that would be something that would be more positive than the fact that their child had died there. And that was something that we were giving, hoping that would be – that they would want to do.

* * * *

[188]

Q. And the bottom photograph, it's a yellow cross superimposed on a heart?

A. Yes, I do.

Q. And under your new criteria, would not have been put up either?

A. Correct.

Q. And if the cross is removed, then the heart and the name Dan Rohrbough could be put up?

A. Correct.

* * * *

[193]

Q. Was the prohibition on religious symbols done because of a fear it would cause any polarization or harassment problems at the school?

S. That being the determiner behind it?

Q. Yeah. Is that the reason for the ban on religious symbols?

A. No. We do not have religious symbols in any of our schools. And we were not going to – you can't just make a decision to put it in one place and not others. It would not have just affected Columbine. It would have affected the district.

THE COURT: Then what's the reason why your district wouldn't put religious symbols in schools, from your perspective?

THE WITNESS: Why we would not?

THE COURT: Right.

[194]

THE WITNESS: Because then it becomes which religious symbols, all religious symbols, do people want religious symbols of all faiths in their school or do they want just certain symbols. Are they going to be just Christian symbols or Jewish symbols, Buddhist symbols, Islamic symbols, and all symbols, so we have no religious symbols. We're not trying to advocate for or against any religion, and we do not have any symbols in our schools.

* * * *

[213]

Q. Exhibit 1, the first page of Exhibit 1, I believe it's your testimony that you wouldn't allow these because they clearly have religious symbols?

A. That's correct.

Q. Is that right?

If we go to page 2 of Exhibit 1, you said you would disallow both of those as well; is that correct?

A. That's correct.

[214]
Q. Because of religious symbolism?

A. Yes.

Q. And then we go to Exhibit 2, the one that has Danny Rohrbough and has the heart and the rose. What was your testimony as to that?

A. The question that I was asked is in this state, would it be allowed and I said no. And they said, if you removed the cross, would it be allowed, and I said yes.

Q. What about the one below it?

A. The same thing. With the cross, no. Without the cross, yes.

Q. Then on page 2 of two, you said that the one at the top, you would allow, that has the word "Dan" on it.

A. Yes.

Q. And has the yellow marks; is that correct?

A. Yes.

Q. And the one below you would allow?

A. Yes.

Q. All right. So if it were your decision today, you would say those two tiles could be mounted at the school and it wouldn't contravene the policy that you had in place?

A. Yes.

* * * *

[215]

THE COURT: So are you saying, then, Mr. Halpern, as to these two tiles, the defendant has no objection to having those tiles mounted at the school?

MR. HALPERN: If my client says that they don't have an objection, it's not my issue after that. That's what I understand.

EXCERPTS OF TRANSCRIPT OF TRIAL TO COURT,
OCTOBER 11, 2001

Barbara Monseu (Cont'd)

[BY MR. ROUSE] [236]
Q. Okay. So there's not supposed to be any religious symbols anywhere in your school district; is that what you're telling us?

A. Yes.

[238]
BY MR. HALPERN:

Q. Concerning the issue of the presence of, quote, a few crosses, end of quote, on the walls, can you think of any constituents of the school, of the members of the school community at Columbine for whom that would be offensive?

A. Yes, I can.

Q. Can you please describe who that would be?

A. Well, there are some members of that community, student community, staff community, community at large, who would be offended at having any religious symbols. There would be some that would be offended to only having what we would consider Christian symbols. And there are many who believe that religious symbols do not belong in the school and would have had issue with that.

Q. Is it correct that – is it correct that tiles permanently affixed to the walls of Columbine High School with religious symbols would run the risk of appearing that the school endorsed religion?

A. I believe it would.

Q. And was that a motivating factor in your decision that religious tiles would not appear?

A. Yes. And again, that's in the context of the entire district, not just Columbine alone.

* * * *

Puanani Warnke

[250]

Q. For the tile-painting sessions, were you given any kind of a list of symbols that could not be used?

A. We were not given a printed list of symbols. Again, it was the general religious symbols, the ribbon, the Columbine blue ribbon that had been added to the list subsequently. That was basically it.

Q. How did you decide which symbols were religious symbols, which symbols weren't religious symbols if you didn't have a list.

A. Basic knowledge.

Q. What do you mean basic knowledge?

A. Most people in the United States know that the cross stands for Christianity, that the star of David stands for Judaism. Islam has the

crescent moon and star.

Q. Did you find any tiles with a crescent moon and star?

A. Not in this painting.

Q. In other paintings?

A. Not in the school.

* * * *

[252]
Q. What was the purpose of the tile painting?

A. The original purpose of the tile painting was to help decorate the newly remodeled school.

Q. Was there kind of an unofficial purpose of the tile painting also?

A. Not originally.

Q. I mean for the summer sessions, wasn't the – to help with healing part of the process also?

A. Okay. The original tile project was to decorate the school. After April 20, it did become a way of healing, a way of getting in touch with each other and with yourself.

* * * *

BY MR. ROUSE:

Q. In the fall of 1999, were students allowed to wear religious T-

shirts and jewelry in the school?

A. Yes.

* * * *

Plaintiff Lisa Rohrbough

[MR. ROUSE] [289]
Q. And what does the tile at the top show us?

A. The top tile is a tile that were symbols that gave me comfort and peace. The fish symbol, which to me means peace. And beside that are the three crosses representing Christ and the two thieves that day at Calvary, and I've always drew that as a child, so it brings me comfort. In the other corner is Dan's initials. And in the bottom corner is a heart which to me symbolizes love.

Q And whose initials are in the bottom left corner?

A. Dan Rohrbough.

Q. And what does the mauve – is that a mauve cross or just quadrants or what?

A. It's quadrants. It was a cross for me, but it does separate.

Q. And what is shown on the second tile you painted there at the bottom of page 2 of Plaintiffs' Exhibit 1?

A. On the bottom tile are Dan's initials, a cross, and Jesus Christ is lord.

Q. Why did you paint that tile?

A. I painted that tile because after Columbine, after April 20, 1999, the one thing that has and continues to keep me functioning and going is my knowledge that Dan is with Jesus and that I'm going to see him again; and even on the worst of days, that's what sustains me and the only memory that – I have good memories of Dan from when he was here and [290] alive, but the memory I have now that always stays with me is that I'll see him again, and that's only possible because Jesus Christ is the lord.

* * * *

[292]
Q. Did you in fact go and paint a tile at the second session?

A. I did not.

[293]
Q. Why not?

A. Because I have the two tiles that I painted for Dan and for me. And those are the only two tiles that I wanted. I can't change my memory of Dan. I can't paint a tile that's abstract because my memories of Dan and what happened to him before and April 20 are – they're clear and crisp, and I can't change that. I can't paint tiles without religious symbols because it wouldn't be being true to myself or my memory of Dan.

[314]
Q. Do you recall telling them that the tiles could not have dates or initials or the Columbine ribbon?

A. I easily could have said that, because that was not consistent with the guidelines. I would not have made an announcement like that, but I had questions to that during the day.

Q. And the reason being that they were not abstract; is that why they couldn't paint the dates, initials, and Columbine ribbons?

A. I'm pretty unclear about that.

* * * *

[322]
Q. What was your involvement?

A. I coordinated the installation with volunteers.

Q. When did that occur?

A. The end of July, first part of August, over several weeks.

Q. At that time was anybody screening tiles for tiles that were appropriate and tiles that were inappropriate?

A. I did direct the volunteers, if they felt that a tile was questionable and if it was blatantly inappropriate, to put it aside and I would put those in a box. Some of those I cut in half when I got to the end. All the tiles didn't fit evenly, so I did have a tile cutter

there and I did cut some of those tiles and used them when I needed a section of a tile.

Q. What were they told would be inappropriate tiles, or was it left up to the volunteers?

A. It was left up to the volunteers. I was under the impression that the tiles had been screened when Barb did them at Chatfield, and I left that to the volunteers.

* * * *

[325]

Question: Do you know what was considered to be a religious symbol that was inappropriate to put on a tile.

Answer: No, I don't.

EXCERPTS OF TRANSCRIPT OF TRIAL TO COURT,
OCTOBER 12, 2001

Plaintiff Donald Fleming

[342][MR. ROUSE]
Q. Did you see any written instructions or rules for painting tiles at this particular tile-painting session?

A. No, I did not.

Q. Were you given any written instructions or rules for painting tiles at this session?

A. Nothing in writing.

Q. At that particular tile-painting session, did anyone tell you what you could or couldn't paint on a tile?

A. Yes. I was told that I couldn't paint anything with a religious symbol, a Columbine ribbon, a name, initial, or date.

Q. Do you know who told you that?

[343]
A. I think it was Pua Warnke, the art teacher, but I'm not positive. But it was somebody – it was the person that gave us instructions on how to paint tiles.

Q. When you went there, did you know what type of tile you wanted to paint?

A. I knew what kind of tile I wanted to paint.

Q. What type of tile did you want to paint?

A. What I wanted to paint was the same tile that my wife wanted to paint which was the date, 4-20, 1999, Jesus wept.

Q. Why did you want to paint that particular tile?

A. That is – that's the tile, when we were originally asked back in June or July to paint the tiles, that's the tile that we discussed that would be most appropriate from both of our points of view.

Q. How did you feel when you found out that you couldn't paint the tile that you wanted to paint?

A. Are we talking about August or are we talking in July?

Q. Whenever you first found out about the tile that you couldn't paint.

A. I felt like – personally, I felt like I was stabbed in the heart, and I was very offended.

Defendant Jon DeStefano

[354][MR. ROUSE]
Q. Is it safe to say that it's school district policy that there not be any religious symbols displayed in the schools?

A. We have policies, a policy regarding how religious symbols could and couldn't be used. For example there could be a class on

the Bible and literature and things like that. So in regard to things like the – in general, I would say the answer to the question is yes.

Q. Would you say that there is a consensus among the board of education that there be no religious symbols on the tiles displayed in the schools.

A. Yes, I would say that.

* * * *

[356]

Q. Do you recall receiving voice mail messages from Barbara Monseu about the tile-painting project?

A. I do.

Q. And do you recall what those messages were?

A. I think they were about the guidelines, and I think she updated us on a regular basis as to different events that were occurring around the issue, including the lawsuits, et cetera.

Q. Did you ever have occasion to find out about the fact that tiles with religious symbols were put up on the walls of Columbine High School and they were going to be taken down?

A. I believe so.

Q. Do you recall how you found out about that?

A. I believe it was probably in a voice mail from either Dr. Hammond or Barbara Monseu.

Q. And was that information relayed to the rest of the board, to your knowledge?

A. Yes. The voice mails were given to the whole board.

Q. Did you approve of taking down the religious symbols that had been put up?

A. We approved of our policy being upheld, absolutely.

Q. So that's a yes, that you and the board –

A. Absolutely.

* * * *

[362][MR. HALPERN]

Q. To your knowledge, did the board ever take any votes, you know, formal action as such, with relation to the tile project or the removal of tiles or whatever?

A. No. And we would not, you know, because it was in adherence to our policy. What would have required a vote was something that was not in adherence to our policy.

* * * *

[363]

Q. Are you aware that in some schools perhaps there are periodically incidental religious statements or symbols that appear on the walls?

A. Well, I know there could be a picture or something like that. But they're not part of, a lasting part of the school. And

perhaps that might appear more as an expression or something.

Q. Do you have – are there relative to those, are there [364] different considerations that the tile project brings – brought up as compared to that sort of a situation?

A. Well, there is in my mind. It's kind of like when we have a graduation or a memorial event involving the school people, we do say some religious things, sing religious songs, and it's part of who we are and it's part of how we express ourselves. And that's different than how we decorate our school and what lasting things we put on that.

Q. Why is that different?

A. It's different because of the nature of one being a permanent-type thing is forever imposed on all the people who come there in the future. And it beings all different kings of meanings and types of things. And it just was a completely different type of feeling for me.

* * * *

[368][MR. ROUSE]
Q. So how permanent does a memorial item have to be before you consider it a permanent memorial?

A. I think in regard to the tiles, okay, that is part of our school building, it's part of our walls, it's a permanent part [369] of it, the tiles. And I think it's a two-part thing. It's not just the permanency of the memorial. It's what can be expressed, where and how and what can't be and what other things might be included in that. I don't think it's a simple issue. If it was simple, I don't think we'd

be here.

* * * *

Q. Mr. DeStefano, are you telling me if the tile had been hung on the wall and could be easily removed on a hook, it was okay, but if it was glued to the wall, it wasn't okay?

A. I'm not telling you that.

Q. Well, that goes back to my question. What makes something permanent in your mind such that it is not allowed on the school walls?

A. I think our tile projects are intended to be a permanent part of the building.

Q. And what I'm asking you is if the tiles had been hung on a hook as opposed to being glued to the wall, would that make any difference in your opinion or in your position?

A. If – I'm not sure. I don't know how to answer that. I'd like to think that one through.

* * * *

Patricia Patrick

[386][MR. ROUSE]

Q. In the summer of 1999, prior to the start of the school year, did Miss Monseu give you any orders regarding the tile project?

A. Yes, she did.

Q. When did she give you those orders?

A. Approximately the end of July in 1999.

Q. And what did she tell you to do?

A. She told me that the tiles that were on the wall that – that there were four criteria that had to be met and if those criteria had been violated, I was to remove the tiles from the walls at Columbine High School.

Q. And what were those criteria, to the best of your recollection?

A. She said if the tile contained a memorial to the event that happened there at Columbine in 1999; or if it had a name; or if the tile had reference to a religious, particular religious symbol; and there is one more which I'm blank right now.

Q. Possibly a date?

A. Date. Correct.

Q. Or initials, something like that?

A. Date, correct. The date referring to 4-20, 1999.

* * * *

[386]

Q. Did she tell you what type of tiles would have religious symbols or religious connotations so that you should remove them?

A. No.

Q. She just left that to your discretion?

A. Yes.

* * * *

Q. And what did you do in response to this directive that Ms. Monseu give to you?

A. I took a custodian with me, and if the tile appeared to [388] have those four items on there, I had the custodian remove the tile.

Q. And did you look at each and every tile in the school?

A. Yes.

* * * *

[399]
Q. Okay. Would you please look at page 5 of Exhibit 11, the top photograph?

A. Page 5. Yes.

Q. It says DEF 0021 underneath it?

A. Yes.

Q. Can you tell me why that tile was removed?

A. Because it appears like there's a cross on that tile.

* * * *

[403]

Q. Well, let's look at the tile in photo 77. On page 18. Do you see that?

A. Yes.

Q. Why was that tile removed?

A. Because of the crosses.

Q. Now, would you agree that that shows some type of wings up in the sky with clouds?

A. Uh-huh.

THE COURT: Is that yes?

THE WITNESS: Yes.

BY MR. ROUSE:

Q. If those crosses had been stars, would you have removed it?

A. I probably would have because of the wings on this, probably.

Q. Wings were on the list of things to be removed?

A. Well, it's a judgment call. That's a judgment call.

Q. Are the wings some kind of religious symbol?

A. I may have left it up. It would be hard. I may have left it up or I may have taken it down. [407]

Q. What about photograph 0114 on the same page. Why was that taken down?

A. Because it appeared to be a fish.

Q. There is something wrong with fish on the walls?

A. Other than it is a religious connotation.

Q. Is this an example of the Christian fish, then?

A. That's how I interpreted it.

Q. It didn't have the Christian fish, but it just had the word "truth," would it have been left on the walls?

MR. HALPERN: I'm going to object to the continual speculation as to what would or would not have happened under different circumstances.

THE COURT: Overruled. The witness may answer.

THE WITNESS: I'm sorry, if it had "truth" and not the fish?

BY MR. ROUSE:
Q. Right.

A. Probably would have been left.

EXCERPTS OF TRANSCRIPT OF TRIAL TO COURT,
OCTOBER 15, 2001

Frank DeAngelis

[MR. ROUSE] [458]
Q. I believe you testified, did you not, that the tile project was for part of the healing process?

A. After the tragedy?

Q. Yeah. Let me – let me clarify. After the shooting, the tile project that the community participated in was to help with the healing process, correct?

A. Correct.

Q. The purpose was to allow students, community members, whoever painted tiles, to express themselves as part of the healing process, correct?

MR. HALPERN: Objection., That's been asked and answered.

THE COURT: Overruled.

THE WITNESS: It would be a – anytime you put something down on tile or paper would be an opportunity for people to express themselves, correct.

BY MR. ROUSE:

Q. And it was expression in connection with the healing process, was it not?

A. Correct.

Q. At the time that you reopened your office, did you not have in your office a photograph of 13 crosses on Rebel Hill?

A. Yes.

Q. And Rebel Hill being the hill just, I believe, to the west of the school where these crosses were put up as memorials to the slain students.

A. Yes.

Q. In fact, in the areas, administrative areas, Lauren Townsend's jersey is displayed there, correct?

A. Yes.

Q. And there's a memorial plaque to here on that, correct?

A. Yes.

Q. And presumably that memorial to Lauren Townsend is up there with the approval of yourself and the school district, right.

A. Yes. It was presented to Columbine High School, that's correct.

Q. That's in an area where students can see the plaque, can they not?

A. If they walk into the office, yes.

Q. In fact, it's right by a window by the athletic department or the athletic window; is that correct?

A. Let me think. It would be, yes, just to the right of the athletic window.

Q. So in fact, anybody standing there at the window could look through and see it, could they not?

A. Yes.

Q. There are also some memorials or memorabilia handing on the walls in the administrative area, are there not?

A. Yes.

Q. Isn't there also a large picture of a Columbine that says – says, God weeps over Columbine this day, April 20, 1999?

A. Yes.

Q. And there's also a picture of some doves witha plaque that says, In honor of those that lost their lives and had their lives forever changed on April 20, 1999; is that right?

A. Yes. The dove picture, yes.

Q. And those two pictures of Columbine and the dove picture are up on the walls with the approval of the school administration, right?

A. The pictures have not been taken down, correct.

Q. And I assume that students coming into the administrative area could see those pictures, right?

A. If they walk by there, yes.

Q. Now, this library that's been approved, this new library, isn't that going to be known as the Columbine Memorial Library?

A. I don't know if a decision has been made on the exact name of it. I know a plaque has been approved by the members of HOPE, but I'm not sure of the exact name of the new library; but they, the parents of HOPE, will have that opportunity to be involved in the naming of the library.

Q. Is it your understanding it's going to be some type of memorial library?

A. I don't know if that's going to be included in the name. We hope to tribute or memorialize the students that were murdered in the library by placing a plaque in the library.

Q. And there will be a plaque to the 13 students killed on April 20, 1999?

A. Yes, sir.

Q. This is supposed to be a fairly large plaque, is it not?

A. Yes. I'm not sure of the dimensions, but it will be large.

Q. Can you tell us what the Columbine ribbon is?

A. That was something that was developed as a result of the tragedy that occurred. Columbine blue ribbon, and it just started appearing.

Q. Was that kind of a limited – ribbon in a loop with blue and silver stripes.

A. Yes. Yes.

Q. And in fact, it's a memorial to the shooting events or the victims; is it not.

A. Yes, very similar to other tragedies.

Supreme Court U.S.
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No. 02-732

In The
Supreme Court of the United States

DONALD A. FLEMING, DIEDRA A. FLEMING, LISA M. MAURER, BRIAN E. ROHRBOUGH, SUSAN A. PETRONE, RICHARD P. PETRONE INDIVIDUALLY, AND NICOLE M. PETRONE, A MINOR, BY AND THROUGH HER FATHER, RICHARD P. PETRONE,

Petitioners,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a tile painting project that was initiated, organized, and supervised by school officials pursuant to established guidelines, funded at the discretion of school officials, and resulted in a permanent display in the school constitutes school-sponsored speech within the meaning of *Hazelwood School District v. Kuhlmeier*.

II. Whether the Tenth Circuit properly applied the legitimate pedagogical concerns test of *Hazelwood School District v. Kuhlmeier*.

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STATEMENT OF THE CASE

Petitioners' statement of facts consists largely of excerpts of raw testimony, implicitly conceding that the findings of the lower courts are inadequate to sustain their position. The findings of the lower courts are sufficient to frame the issues.

On April 20, 1999, Eric Harris and Dylan Klebold attacked Columbine High School with homemade bombs and automatic weapons, killing twelve classmates and one faculty member before taking their own lives. *Fleming v. Jefferson County Sch. Dist. R-1*, 170 F. Supp. 2d 1094, 1098 (D. Colo. 2001). The severely damaged building was sealed as a crime scene, requiring the surviving students to complete the school year at a neighboring school. *Id.*

The prospect of reintroducing students to the Columbine building posed significant mental health challenges. *Id.* School officials made a concerted effort to change the building's appearance to avoid incorporating sensory cues that could reactivate memories of the attack. *Id.* at 1098-99. A number of activities were held to reacquaint students with the building. One of these activities involved inviting students, families of the victims, and members of the affected community, such as rescue workers, to paint decorative ceramic tiles that would be placed on the walls of the school's hallways.[1] *Id.* at 1099.

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[1] The process of decorating the halls with ceramic tiles began prior to the attack with students producing abstract, nonobjective tiles or tiles related to the subject matter of their classes such as frogs, volcanos, bugs, and lightning. *Fleming v. Jefferson County Sch. Dist. R-1*, 170 F. Supp. 2d 1094, 1098 (D. Colo. 2001). There are approximately

(Continued on following page)

In order to prevent the project from becoming a memorial to the tragedy, area administrator Barbara Monseu directed that the tiles could not contain references to the attack, the date of the attack, names or initials of students, the blue Columbine ribbon,[2] religious symbols, or anything offensive. *Id.* A school district press release explained that the project, "will serve two purposes. Students will have another opportunity to come into the school and become more comfortable with the surroundings. By participating in creating the tile art, they will also be part of the reconstruction of their school."[3] *Id.*

Materials for the tile project were purchased with donations that were to be used at the discretion of the high school administrators. *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 921 (10th Cir. 2002). The session was supervised by three teachers. *Fleming*, 170 F. Supp. 2d at 1100. Participants entered through a door where a notebook and examples of abstract or nonobjective tiles were displayed as illustrations of acceptable tile designs.

2100 tiles on the walls of the school. *Id.* at 1103. The photos in Petitioners' Lodging encompass a small and unrepresentative sample of these 2100 tiles, focusing instead on tiles that were rejected, and even then contain an unrepresentative selection of the rejected tiles.

[2] The Columbine ribbon is a loop of blue ribbon that commemorates the attack similar to the loops of red, white, and blue ribbon that commemorate the terrorist attacks of September 11, 2001.

[3] Petitioners' representation that the purpose of the project was to allow persons "to express themselves regarding the process of healing from the trauma caused by the shooting" is an embellishment of their own construction. Healing was to be effected by reacquainting students with the building and taking part in its reconstruction. As Petitioners concede, the project's guidelines forbade references to the attack.

Id. The guidelines were verbally communicated to participants. *Id.* The teachers tried to screen out tiles that were inconsistent with the guidelines, but were unable to keep pace with the volume of tiles being produced. *Id.* Consequently, some tiles that were inconsistent with the guidelines were covered with an opaque glaze and sent to be fired in a kiln. *Id.* Petitioners, parents of students who were murdered in the attack, objected to the guidelines. *Id.* The teachers allowed Petitioners to paint tiles as they wished, but informed them that tiles that did not comply with the guidelines would be returned to them and would not be affixed to the school walls. *Id.* Petitioners produced tiles that included the phrase, "Jesus Christ is Lord," and "There is no peace says the Lord for the wicked." *Id.* at 1101. Two Petitioners hoped to paint tiles stating "4/20/99 Jesus Wept," but declined to do so when they learned that the tiles would not be displayed. *Id.*

One of the supervising teachers organized parent volunteers to glue the tiles to the walls. She instructed the volunteers to set aside tiles that were questionable or inappropriate. *Id.* at 1102. Due to the volume of tiles and limited time, she was unable to supervise the installation on a tile-by-tile basis. *Id.*

Shortly before the Columbine building was to be reopened, Ms. Monseu noticed that some tiles affixed to the walls did not comply with the guidelines. *Id.* at 1102-03. She directed assistant principal Patricia Patrick to remove any tiles that contained a memorial to the attack, a name, a religious symbol, or a date. *Id.* at 1103.

Ms. Patrick removed approximately eighty tiles including tiles with crosses, the Star of David, the Columbine ribbon, the date of the attack, tiles with names, and a

tile with the initials "DK" incorporated into the design, thought to represent the initials of Columbine assailant Dylan Klebold. *Id.* A tile depicting a face with blood dripping from the temple was removed. *Id.* Ms. Patrick removed tiles with the anarchy symbol and gang graffiti as well as tiles that Ms. Patrick believed may have incorporated symbols with a meaning discernible only to juveniles hoping to get away with something. *Id.* Ms. Patrick also removed a tile mural created by an art teacher because the teacher had signed her name to the mural. *Id.* She removed a tile mural created by a second art teacher because its red colors were perceived by some viewers as blood spatter.[4] *Id.*; Applt. App. at 776.

Ms. Monseu subsequently offered to allow the families of the murdered children to prepare a tile with the name of their child, but not the date of the shooting, religious symbols, or anything offensive. *Id.* at 1103-04. Petitioners refused and brought suit alleging violations of the Free Speech Clause, the Establishment Clause, the Free Exercise Clause, and the Colorado Constitution. *Id.* at 1096, 1104.

The district court entered judgment for Respondent on every claim except the free speech claim. *Id.* at 1122-23. Respondent appealed the free speech claim. Petitioners did not cross-appeal. The Tenth Circuit, in an opinion by Judge David Ebel, joined by Judges Murphy and Henry,

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[4] Thus, Petitioners' representation that "[s]chool officials strictly enforced only one rule relating to the viewpoint of the expression on the tiles – a prohibition on religious symbols of any kind" (Pet. at i) is contradicted by the record. (The notation Applt. App. refers to the record on file with the Tenth Circuit.)

reversed. *Fleming*, 298 F.3d at 934. Petitioners' motion for rehearing *en banc* was denied without dissent.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit Correctly Applied *Hazelwood*.

A. The Tenth Circuit's Decision Is Correct.

The Tenth Circuit's decision is anchored to *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* arose out of a conflict between student reporters and the school principal regarding articles to be published in the school newspaper. The Court framed the issue as follows:

> The question of whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school to affirmatively promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school sponsored publications, theatrical productions, and *other expressive activities that students, parents and members of the community might reasonably perceive to bear the imprimatur of the school.*

Id. at 270-71 (emphasis added). The Court also observed that absent creation of a public forum, "school officials may impose reasonable restrictions on the speech of students, teachers, *and other members of the community*." *Id.* at 267 (emphasis added).

The Court held that educators may regulate school-sponsored speech as long as those regulations are reasonably related to legitimate pedagogical concerns. *Id.* at 273. These concerns go beyond enforcing the rules of grammar:

> A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order or to associate the school with any position other than neutrality on matters of political controversy.

Id. at 272.

The Tenth Circuit noted that *Hazelwood* occupies a middle ground between private speech that is broadly protected by the First Amendment and government-funded speech to which the First Amendment does not apply. *Fleming*, 298 F.3d at 923. The court determined that the tiles project constituted a school-sponsored expressive activity within the meaning of *Hazelwood* because:

> The tiles at issue in this case will become a lasting part of the school. The presence of permanently affixed tiles on the walls implicates the school's approval of those tiles. When coupled with organizing, supervising, approving the funding, and screening the tiles, the school's decision permanently to mount them on the walls conveys a level of approval of the message. If a tile advocating racial hatred or sexual bigotry or encouraging the use of illicit drugs were affixed to the walls, community members rightly might

> protest that the school implicitly if not explicitly promoted such values.

Id. at 930.

The court noted that two pedagogical concerns underlay the project's guidelines – "to ensure that the interior of the building remained a positive learning environment, and not become a memorial to the tragedy, and . . . to avoid divisiveness and disruption from unrestrained religious debate on the walls." *Id.* at 932. The court found both concerns to be legitimate. *Id.* at 931-32; *accord Hazelwood*, 484 F.3d at 272 (school officials may refuse to sponsor speech that "associate[s] the school with any position other than neutrality on matters of political controversy.").

The court also stated that *Hazelwood* does not require legitimate pedagogical concerns to be viewpoint neutral, explaining: "No doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint." *Fleming*, 298 at 928; *accord Hazelwood*, 484 U.S. at 272 ("school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use"). It further explained: "If the District were required to be viewpoint neutral in this matter, the District would be required to post tiles with inflammatory and divisive statements, such as 'God is Hate,' once it allows tiles that say 'God is Love.'" *Fleming*, 298 F.3d at 934. The court held: "[W]e believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Id.*; *accord Hazelwood*, 484 U.S. at 272 ("A school must also retain the authority to refuse to . . . associate the school with any

position other than neutrality on matters of political controversy.").

In the end, the Tenth Circuit correctly applied *Hazelwood* to the tiles project.

B. The Tile Project Is School-Sponsored Speech That Bears the School's Imprimatur.

Petitioners contend that the Tenth Circuit's application of *Hazelwood* to the tiles project represents a "dramatic departure" from this Court's precedents. Petitioners, however, offer no argument to demonstrate why this is so. Instead, they simply argue that if the project had been considered a limited or nonpublic forum, the outcome would have been different. Neither their premise nor their conclusion is correct.

While *Hazelwood* arose in the context of a student newspaper, courts have routinely noted that its rationale is more broad. *E.g. Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817, 827 (9th Cir. 1991) ("Although the facts of *Hazelwood* dealt with student expression, its rationale is not so limited.") Thus, the *Hazelwood* analysis has been applied to the expressive activities of teachers, guest speakers, marching bands, advertisers in school newspapers, advertisers on the fence of a high school baseball diamond, and participants in a high school career day. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999) (baseball field), *cert. denied*, 529 U.S. 1067 (2000); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) (guest speaker), *cert. denied*, 515 U.S. 1160 (1995); *Miles v. Denver Publ. Schs.*, 944 F.2d 773 (10th Cir. 1991) (teachers); *Planned Parenthood*, 941 F.2d 817 (advertisers);

Searcey v. Harris, 888 F.2d 1314 (11th Cir. 1989) (career day); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999) (marching band).

Petitioners appear to assert that the tile project should have been considered a limited or nonpublic forum and analyzed under such cases as *Good News Club v. Milford School District*, 533 U.S. 98 (2001) and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993). The analogy, however, does not hold. For example, the religious club in *Good News* was not initiated by school personnel. School officials did not authorize funding for the club or supervise the meetings to insure that they complied with school guidelines. Finally, the club was not allowed to create a permanent display in the school hallways. *Good News*, *supra*. All of the cases cited by Petitioners involved the temporary use of school facilities for *private activities*. They did not involve *school activities*. There is a distinction of constitutional significance between private activities and school activities. *Compare Good News*, 533 U.S. at 115 (private religious activities that occur after school in school facilities do not implicate Establishment Clause) *with Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (religious activities at football game implicate Establishment Clause); *Lee v. Weisman*, 505 U.S. 577 (1992) (religious activities at graduation implicate Establishment Clause).

Here, the evidence is undisputed that the tile project was initiated, organized, and supervised by school personnel. *Fleming*, 298 F.3d at 930. School personnel set and enforced guidelines for the project. *Id.* School personnel authorized payment for the project. *Id.* Finally, approved tiles were put on permanent display in the school hallways. Given that the term "imprimatur" means "let it be

printed,"[5] the Tenth Circuit's conclusion that the tile project constituted a school-sponsored expressive activity bearing the imprimatur of the school was not a dramatic departure from precedent, but a straightforward application of *Hazelwood*.[6]

C. The Tenth Circuit's Decision May Be Affirmed on the Broader Grounds of Government Speech.

While the Tenth Circuit found *Hazelwood* to occupy a middle ground between private speech and government-funded speech, the tile project easily fits within government speech precedents.

School officials determined that the project should not be a memorial to the tragedy or a site for religious debate.[7]

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[5] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1137 (1986).

[6] Petitioners attempt to forge a limited public forum out of an isolated statement from Ms. Monseu's deposition that the tile project was something "outside of school." As the Tenth Circuit properly recognized, however, the full remark is ambiguous at best and does not erase the pervasive involvement of school officials. *Fleming*, 298 F.3d at 930-31, n.11.

[7] Petitioners' representation that "the entire tile project served as a reminder of the shooting" is not sustained by the record. As noted above, the Lodging depicts only a handful of the tiles that are on the walls, focusing primarily on selected tiles that were rejected. While Petitioners attribute meaning to any tile that includes thirteen objects, be they stars, butterflies, or raindrops, there are tiles with, for example, seven raindrops (ex. 3 of Applt. App., photo #113), eight raindrops (#181), eighteen raindrops (#30), twenty-three raindrops (#171), forty raindrops (#147), and many, many raindrops (#145). Thus, Petitioners discern a meaning that perhaps was not intended and exists only if viewers actually count objects, an unlikely scenario for students moving between classes. To the extent that Petitioners identify tiles that may

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Petitioners, families who lost children in the attack, sought to produce and display tiles that memorialized the attack and included religious inscriptions, *e.g.*, "4/20/99 Jesus Wept," "There is no peace says the Lord for the wicked," and "God is Love." While their motivations are understandable, Petitioners are no different from artists complaining after a patron refuses to display work that is not consistent with the work that the patron commissioned. An artist may object to the terms of a government commission, but the First Amendment does not entitle the artist to change the commission. *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 833-34 (1995) ("When the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."); *see also Rust v. Sullivan*, 500 U.S. 173 (1991) (government may support discussion of family planning services but prohibit mention of abortion).

This analysis has been applied where a teacher who otherwise had access to school bulletin boards insisted that he had a First Amendment right to post materials that conflicted with the school's efforts to promote tolerance of gay and lesbian students. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000), *cert. denied*, 532 U.S. 994 (2001). The Ninth Circuit rejected his claim, stating that because the bulletin boards were a manifestation of the school policy to promote tolerance and the school principal had final authority over the content of

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or may not bear a reference to the attack, they demonstrate only that the school's screening of 2100 tiles was less than perfect, not that the school intended to do what the guidelines sought to avoid – create a memorial.

the bulletin boards, all speech that occurred on the bulletin boards was the school's and the teacher could not use the First Amendment to force the school to embrace his viewpoint. *Id.* at 1012, 1015.

Here, Petitioners were given special access to a captive audience of students and sought to use that access to create a memorial to the attack and to engage the students in a debate that the school sought to avoid. In the end, the Tenth Circuit's application of *Hazelwood* was not a dramatic departure from precedent, but a cautious application of the narrower of two precedents.

II. The "Conflict" Between Circuits Is One of Form Not Substance.

A. The "Conflicting" Cases Support the Tenth Circuit's Conclusion.

Petitioners contend that by interpreting *Hazelwood* to allow school officials to make viewpoint-based decisions that are reasonably related to legitimate pedagogical concerns, the Tenth Circuit placed itself in conflict with other circuits. The "conflicting" cases, however, do not contradict the result reached by the Tenth Circuit, but instead demonstrate that the decision may be affirmed without reaching the issue presented by Petitioners.

Petitioners argue that "[t]he Tenth Circuit's holding is in direct conflict with . . . the Ninth Circuit's decision in *Downs*,"[8] a contention that is well off the mark given that *Downs* applied the government speech analysis instead of

[8] Pet. at 18 (citation omitted).

Hazelwood. *Downs*, 228 F.3d at 1011. Instead, the case at the heart of the asserted conflict is *Planned Parenthood,* in which a school refused to run an advertisement submitted by a family planning organization in the school's newspaper. 941 F.2d at 819. *Planned Parenthood* does state that under *Hazelwood* restrictions on school-sponsored speech must be viewpoint neutral.[9] 941 F.2d at 829. Nonetheless, the court *upheld* the school's refusal to run the advertisement as a reasonable means for the school to "avoid being forced to open up their publications to advertisements on both sides of the 'pro-life' – 'pro-choice' debate." *Id.* This reasoning parallels the Tenth Circuit's holding: "[T]he District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 934. In short, just as the Ninth Circuit permitted a school to abstain from the pro-life/pro-choice debate, the

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[9] The Ninth Circuit's leap to viewpoint neutrality is somewhat truncated:

> Having concluded that the advertising pages in the school district's school-sponsored publications are nonpublic forums, we now consider whether the school's justification for refusing to publish Planned Parenthood's advertisement is reasonable. *Hazelwood*, 484 U.S. at 270. "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806.

Planned Parenthood, 941 F.2d at 829. If *Hazelwood* had transposed the limited or nonpublic forum analysis of *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788 (1985), to the educational setting, the discussion of school-sponsored speech and legitimate pedagogical concerns – the express holding of the case – would have been unnecessary. 484 U.S. at 273.

Tenth Circuit permitted a school to abstain from the God is Love/God is Hate debate. In fact, the Tenth Circuit expressly relied on Ninth Circuit precedent to reach its holding:

> Two courts recently have recognized a school's legitimate interest in avoiding religious controversy and disruption resulting from the posting of religious speech. In *DiLoreto,* the Ninth Circuit found the school district's decision to exclude advertisements on a baseball field fence "on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy." 196 F.3d at 969. The *DiLoreto* court found that because students were a "captive audience" at classes and school-sponsored events, the district's desire to avoid "controversy and distraction created by political and religious messages" on the fence was reasonable. *Id.* at 968. The Court also noted the school district's concern that posting the religious speech, "would force [it] to open the forum to all expressions of personal beliefs." *Id.* The Seventh Circuit in *Gernetzke v. Kenosha Unified School District No. 1*, 274 F.3d 464 (7th Cir. 2001), *cert. denied,* 122 S. Ct. 1606 (2002), recognized similar concerns, upholding a principal's decision prohibiting a religious group's posting of a cross because he feared that allowing the cross "might also require him to approve murals of a Satanic or neo-Nazi character which would cause an uproar." *Id.* at 466. *Like these courts, we believe that the District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls.*

Fleming, 298 F.3d at 933-34 (emphasis added).

Gernetzke arose after a school invited student clubs to paint murals in the school hallways, but the principal rejected design elements of murals offered by skinheads (a swastika), Students Against Drunk Drivers (a brand of beer), and the Bible club (a Latin Cross). 274 F.3d at 466. The Bible club sued. The Seventh Circuit, relying on *Hazelwood*, upheld the principal's decision. Judge Posner explained that the principal's "reaction to the swastika, and to the naming of the brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that lead to litigation or disorder." *Id.* at 466. Here, of course, the school removed tiles with the Columbine ribbon, the date of the attack, a tile of a face with blood dripping from the temple, tiles with the anarchy symbol and gang graffiti, and a tile with an art teacher's signature.

A "conflict" in which three circuits reach the same conclusion and cite each other in the process is not a conflict at all. The distinction, if there is one, is that the Ninth Circuit views a school's decision to prevent school walls from becoming the site of a religious debate as a permissible restriction on subject matter,[10] while the Tenth Circuit views the restriction as being reasonably related to the legitimate pedagogical concern of "preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 934. In short, the Tenth Circuit's legitimate pedagogical concern is treated as a restriction on subject matter by the Ninth Circuit. *See DiLoreto*, 196 F.3d at 969.

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[10] *DiLoreto*, 196 F.3d at 969.

Given that Columbine educators did not post "God is Hate" to the exclusion of "God is Love," the "conflicting" cases demonstrate that the school's decision may properly be considered a restriction on subject matter.

For example, the "conflicting" decision from the Eleventh Circuit states that "*Hazelwood* acknowledges a school's ability to discriminate based on *content* not *viewpoint*,"[11] but explains that this allows educators to exclude discussion of controversial matters such as "the morality of war or defense spending,"[12] reasoning that tracks the analysis of the Seventh Circuit,[13] the Ninth Circuit,[14] and the Tenth Circuit. *Fleming*, 298 F.3d at 934 (restriction on religious symbols was reasonably related to legitimate goal of preventing disruptive religious debate). Similarly, the "conflicting" Third Circuit case states that *Hazelwood* permits "reasonable non-viewpoint-based restrictions,"[15] but adds that since the challenged "provisions appear to exclude all religious speech and not just one particular viewpoint, such a limitation would constitute a permissible content-based restriction,"[16] reasoning that is consistent with the Seventh, Ninth, Tenth, and Eleventh Circuit cases discussed above.[17]

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[11] *Searcey*, 888 F.2d at 1319 n.7 (emphasis in original).

[12] *Id.* at 1323.

[13] *Gernetzke*, 274 F.3d at 466 (upholding prohibition on religious or secular displays that may lead to "litigation or disorder").

[14] *DiLoreto*, 196 F.3d at 969 (potential for disruption and controversy justified excluding Ten Commandments from outfield walls).

[15] *Brody v. Spang*, 957 F.2d 1108, 1118 (3d Cir. 1992).

[16] *Id.* at 1122.

[17] Petitioners assert that the Tenth Circuit is in conflict with the Sixth Circuit. This "conflict," however, is dicta from a decision that was

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As the foregoing makes clear, the "conflict" is one of form not substance, and the differing analytical frameworks have not yielded conflicting results.[18] In fact, Petitioners fail to identify a single circuit in which the outcome of this case would have been different. In the end, the conflicting cases demonstrate that the school's guidelines may be upheld as permissible restrictions on subject matter without addressing whether *Hazelwood* authorizes school officials to make viewpoint-specific decisions that are reasonably related to legitimate pedagogical concerns.[19]

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reversed. *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999) (interpreting but not applying *Hazelwood*), *rev'd*, 236 F.3d 342 (6th Cir. 2001).

[18] Both times that the Ninth Circuit has applied *Hazelwood* – *Planned Parenthood* and *DiLoreto* – it has upheld the school's editorial choice. In the thirteen years since *Searcey* was decided, no court has relied upon it to overturn a school's editorial choice. Nor has any court relied upon *Brody* to overturn a school's editorial choice in the eleven years since it was decided. Thus, the "conflict" hardly represents a pressing issue in the area of education law. Moreover, the "conflict" may well resolve itself. A Ninth Circuit panel recently acknowledged that the leap to viewpoint neutrality may have been ill-considered. *Downs*, 228 F.3d at 1010 ("Despite the absence of express 'viewpoint neutrality' discussion anywhere in *Hazelwood*, the *Planned Parenthood* court incorporated 'viewpoint neutrality' into nonpublic forum, school-sponsored speech cases in our Circuit."). Subsequently, another Ninth Circuit judge announced: "*Hazelwood* . . . establish[es] that – consistent with the First Amendment – a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose." *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002) (Graber, J.).

[19] Petitioners' argument that they would have prevailed if the tile project had been treated as a limited or nonpublic forum is undone by the fact that "control over access to a nonpublic forum can be based on

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B. *Hazelwood* Does Not Require Viewpoint Neutrality.

While not necessary to resolve this case, the notion that *Hazelwood* permits educators to make viewpoint-based decisions in determining what speech will bear the school's imprimatur is directly addressed in *Hazelwood*: "A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order. . . ." 484 U.S. at 272. Thus, *Hazelwood* expressly contemplates that a school can support speech that advocates sobriety but not drunkenness, sexual responsibility but not sexual profligacy, racial tolerance but not racial hatred, gender equity but not gender dominance, and self-government but not totalitarianism.

The rationale underlying *Hazelwood* is that "public schools are . . . vehicles for inculcating fundamental values necessary to the maintenance of a democratic political system." *Board of Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quotation marks omitted). As *Hazelwood* explains, if Petitioners' position

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subject matter so long as the distinctions are reasonable in light of the purposes served by the forum," *Cornelius*, 473 U.S. at 806. This Court has long recognized that avoiding controversy and disruption is a permissible reason for restricting subject matter in limited or nonpublic forums. *Id.* at 811; *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 303-04 (1974) (upholding prohibition against political advertising on city buses). This principle finds special application in the context of religion and public schools. *See Santa Fe*, 530 U.S. at 311 (school program encouraging divisiveness along religious lines is at odds with Establishment Clause).

were adopted then "schools would be unduly constrained from fulfilling their role as a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Hazelwood*, 484 U.S. at 272 (citation and quotation omitted).

This Court should be under no illusion as to the consequences of the rule that Petitioners seek to impose. If viewpoint neutrality is required, students will be empowered to fill school newspapers, yearbooks, art displays, and, in this case, the walls of the school with work that is morbid (the tile of a face with blood dripping from the temple), antisocial (the tiles with gang graffiti), or lawless (the tile with the anarchy symbol). A school paper that runs an article encouraging young women to pursue a career in law would be compelled to run an article contending that women are emotionally unsuited for the profession. A school that allows students to design a bulletin board promoting racial tolerance would be compelled to allow other students to promote racial supremacy.

The consequences of incorporating a viewpoint neutrality requirement into school-sponsored speech go well beyond compromising the educational mission of schools. Doing so would further blur the inevitably indistinct line between content and viewpoint-based decisions. *Rosenberger*, 515 U.S. at 830-31 (distinction between content and viewpoint "is not a precise one."). For example, while *Searcey* ostensibly condemns viewpoint-based regulations,

in attempting to apply this rule the court ends up condoning what the rule condemns.[20] 888 F.2d at 1322 (regulation prohibiting a group whose sole purpose is discouraging students from pursuing a particular occupation or educational opportunity is permissible); *id.* at 1324 (regulation banning criticism is permissible to the extent that it prohibits a group from denigrating the opportunities offered by another group); *see also Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673-74 (1998) (urging caution in extending principle of viewpoint neutrality to public broadcasters, explaining, "Much like a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, or a public school prescribing its curriculum, a broadcaster by its nature will facilitate the expression of some viewpoints instead of others.").

In addition, if schools are faced with an "all-viewpoints or no-viewpoints" choice, schools likely will not sponsor any expressive activities. "A First Amendment jurisprudence yielding these results does not promote speech but represses it." *Id.* at 682.

Petitioners close with a cry of wolf:

> The Tenth Circuit thus misses the point in observing that viewpoint neutrality would require

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[20] This case hardly presents a suitable vehicle for cleanly dissecting the concept of viewpoint from subject matter because a wide variety of tiles were removed and Petitioners' tiles were not displayed for *two* reasons; (1) the concern related to unrestrained religious debate, and (2) because they served as memorials to the attack (*e.g.*, "4/20/99 Jesus Wept," "There is no peace, says the Lord, for the wicked."). *Fleming*, 298 F.3d at 933.

> Respondent to post a tile that states "God is Hate" if it posts one stating "God is Love." Rather, in its regime allowing Respondents to employ viewpoint discrimination, Respondents could choose to display a tile that states "God is Hate" (or "God is Love," or "God is a Myth") with no obligation to post tiles that express other viewpoints.

Pet. at 27.

This protest ignores that *Hazelwood* has limits. While there is a legitimate pedagogical reason for promoting sobriety over drunkenness, there is no legitimate pedagogical reason for promoting God is Hate over God is Love. Indeed, if the school were to protect one statement to the exclusion of the other, it would violate the Establishment Clause. *Santa Fe*, 530 U.S. at 309 (school sponsorship of a religious message is impermissible); *Stone v. Graham*, 449 U.S. 39 (1980) (permanent display of Ten Commandments in public school violates Establishment Clause).

In the end, this protest gives up the game. Petitioners note that the school did not post God is Hate or God is a Myth to the exclusion of God is Love. In so doing, they concede that school officials acted in a viewpoint neutral fashion to avoid the debate entirely. While *Hazelwood* authorizes viewpoint-based decisions,[21] it authorizes something else as well: "A school must also retain the authority to refuse to . . . associate the school with any

[21] 484 U.S. at 272 ("A school must . . . retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order. . . .").

position other than neutrality on matters of political controversy." 484 U.S. at 272. This is exactly what Columbine school officials did: "[T]he District's restriction on religious symbols was reasonably related to its legitimate goal of preventing disruptive religious debate on the school's walls." *Fleming*, 298 F.3d at 933-34.

CONCLUSION

On April 20, 1999, two young men trapped nearly two thousand students in Columbine High School for several hours to the sound of gunfire, explosions, fire alarms, and sirens. Those students emerged to the knowledge that twelve classmates and a teacher had been murdered and dozens of other classmates had been maimed within the building that they called "school." Reopening that building forced educators, who were themselves struggling with the loss of their students and colleague, to make difficult decisions as to how to appropriately honor those who were lost while accommodating the needs of those who remained. Difficult decisions cannot, and do not, satisfy everyone. Petitioners – families of students who were lost – may wish that different decisions had been made. Nonetheless, the Tenth Circuit properly recognized that the decisions that were made were reasonable and legitimate. Petitioners offer no basis for prolonging this litigation by revisiting those decisions in the name of the Constitution.

WHEREFORE, the Respondent respectfully asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

DONALD F. FLEMING, *et al.*,
Petitioners,

v.

JEFFERSON COUNTY SCHOOL DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Petitioners pursuant to Rule 37.3 of this Court.[1]

[1]All parties have consented to the filing of this brief, and their letters of consent accompany this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* and its members made any monetary contributions to the preparation or submission of this brief.

The Becket Fund is a bipartisan and interfaith public-interest law firm that protects the free expression of all religious traditions. *Amicus* is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of students and other individuals and institutions to speak on matters from a religious viewpoint without their speech being censored because of that viewpoint. For example, *amicus* represented the student plaintiff whose free speech rights were at issue in the Third Circuit's *vacated* opinion in *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999), *reh'g en banc granted, opinion vacated*, 197 F.3d 63 (3d Cir. 1999), an opinion on which the Tenth Circuit heavily relied in this case. *See Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918, 926-27 (10th Cir. 2002).

Our present brief addresses the limited issue of whether this Court should grant the Petition for *certiorari* on the first question raised by Petitioners:

> Whether *Hazelwood School District v. Kuhlmeier* permits viewpoint-based discrimination against religious speech where the speech, consisting solely of private expression, is deemed by school officials to be "school-sponsored."

Amicus presents no opinion on whether this Court should grant the petition for *certiorari* on the second question raised by Petitioners. Because of the narrow focus of this brief, *amicus* believes this brief will complement and not duplicate the briefs of the parties and so prove helpful to the Court in its resolution of this case.

SUMMARY OF ARGUMENT

The Tenth Circuit's answer to Petitioners' first question, *i.e.*, that viewpoint discrimination is permissible

without a showing of compelling government interest, represents a radical departure from this Court's Free Speech jurisprudence and exacerbates the confusion among the Circuits as to whether *Hazelwood* permits viewpoint discrimination. Accordingly, this Court should grant *certiorari* on this question in order to ensure conformity by the lower courts to this Court's Free Speech jurisprudence, and to bring uniformity to the Courts of Appeals, the majority of which hold that *Hazelwood* does not permit censorship of student speech based on viewpoint.

ARGUMENT

I. The Tenth Circuit's Sanctioning of Viewpoint Discrimination in the School Setting Represents a Radical Departure from this Court's Free Speech Jurisprudence.

In holding that school-sponsored student speech may be censored on the basis of viewpoint, the Tenth Circuit purported to rely on this Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988). *See Fleming*, 298 F.3d at 926. However, *Hazelwood* dealt with the issue of *content-based* or *subject matter-based* restrictions on the student speech in a school-sponsored newspaper that was part of the school curriculum. It did not, as the Tenth Circuit held, provide any support for imposing the much more invidious censorship of prohibiting speech because of the *viewpoint* it expresses. In *Hazelwood*, the Court specifically held:

> [E]ducators do not offend the First Amendment by exercising editorial control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (emphasis added). While this Court found that a school could restrict discussion of pregnancy and divorce in general (a content-based restriction), *see id.* at 274, it nowhere suggested that the school could have allowed an article discussing the merits of divorce from one perspective but forbidden another article from a religious perspective (an obvious viewpoint-based restriction).

The Tenth Circuit's reliance, *Fleming,* 298 F.3d at 928, on the absence of any discussion of viewpoint discrimination in the *Hazelwood* majority opinion to support its approval of viewpoint-based censorship of school-sponsored student speech is severely misplaced. The Tenth Circuit simply overlooks that no party in *Hazelwood* disputed the impermissibility of viewpoint restrictions because the school officials in that case *conceded* that any control they exercised over school-sponsored student speech must be viewpoint neutral. *See Hazelwood,* 484 U.S. at 287 n.3 (Brennan, J., dissenting) ("Petitioners themselves concede that '[c]ontrol over access' to Spectrum is permissible only if 'the distinctions drawn . . . are *viewpoint neutral.*'" (emphasis added)).[2]

Hazelwood followed directly from *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985), which held that content-based discrimination—that is, discrimination based on subject matter and speaker identity—in a non-public forum is permissible "so long as

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[2]The First Circuit's dicta in *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (cited by the Tenth Circuit, *see Fleming,* 298 F.3d at 927), stating that *Hazelwood* does "not require that school regulation of school-sponsored speech be viewpoint neutral" also appears to have overlooked the school's concession in *Hazelwood* that viewpoint neutrality was required.

the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*." (Emphasis added.) The Court in *Cornelius* held that "[w]hile we accept the validity and reasonableness of the justifications offered by petitioner for excluding advocacy groups from the [non-public forum], those justifications cannot save an exclusion that is in fact *based on the desire to suppress a particular point of view*." *Id.* at 812 (emphasis added). The Court then remanded the case to examine whether "the exclusion of respondents was impermissibly motivated by a desire to suppress a particular *point of view*." *Id.* at 812-13 (emphasis added). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (observing that *Cornelius* and other cases permit "reasonable and *viewpoint-neutral* content-based discrimination in nonpublic forums") (emphasis added).[3]

Thus, taken together, *Hazelwood* and *Cornelius* permit content-based restrictions on government-sponsored speech in non-public forums only where such restrictions are viewpoint-neutral. Moreover, these cases are part and parcel of this Court's clear and unwavering censure of viewpoint discrimination in any forum. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

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[3]Even in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), this Court emphasized that school officials' discipline of a student for giving a sexually suggestive campaign speech was *not* viewpoint discrimination. *See id.* at 685 ("the penalties imposed in this case were unrelated to any political viewpoint").

Accordingly, this Court should address and correct the Tenth Circuit's endorsement of viewpoint discrimination by granting *certiorari* on the first question in the petition.

II. The Tenth Circuit's Holding Exacerbates the Confusion Among the Circuits as to Whether *Hazelwood* Permits Viewpoint Discrimination.

Despite this Court's consistent censure of viewpoint discrimination and the seeming clarity of *Hazelwood* itself, confusion reigns among the Circuits as to whether *Hazelwood* permits viewpoint discrimination. The Tenth Circuit's holding in this case serves only to exacerbate this confusion and highlights the need for this Court to provide guidance to the lower courts concerning the breadth of students' free speech rights.

On the one hand, the Tenth Circuit's holding departs from the majority view of the Circuits. Specifically, the majority of the Circuits has held that, although *Hazelwood* provides some discretion to impose restrictions on the content and subject-matter of school-sponsored student speech, schools must still observe viewpoint-neutrality when censoring that speech.

For example, in *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989), the Eleventh Circuit held:

> Although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis. Without more explicit direction, we will continue to require school

> officials to make decisions relating to speech which are *viewpoint neutral*.

Id. at 1325 (first emphasis in original, second emphasis added, citations omitted); *see also Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800-01 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("In *Hazelwood* . . . , the Court recognized that public school officials could impose, consistently with the first amendment, reasonable restrictions upon the *subject matter* of a student-published newspaper.") (emphasis added); *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (holding that school newspaper, sporting event programs, and yearbook were school-sponsored, non-public fora under *Hazelwood* and *Cornelius,* and therefore "control over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*.") (quoting *Cornelius*, 473 U.S. at 806) (emphasis added); *Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (holding that *Hazelwood* and *Cornelius* require censorship of school-sponsored student speech to be "viewpoint neutral" and remanding for inquiry into viewpoint neutrality); *Hedges v. Wauconda*, 9 F.3d 1295, 1298 (7th Cir. 1993) ("Even when the government may forbid a *category* of speech outright, it may not discriminate on account of the speaker's *viewpoint*[,] . . . [e]specially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection.") (emphasis added); *Good News/Good Sports Club v. Sch. Dist. of City of Ladue*, 28 F.3d 1501 (8th Cir. 1994) (striking down policy prohibiting "any speech or activity involving religion or religious beliefs" in a nonpublic school forum because suppression was viewpoint-based); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719 (2d Cir. 1994) ("the Supreme Court has held that

educators may limit the *content* of school-sponsored speech so long as the limitations are 'reasonably related to legitimate pedagogical concerns,'") (citing *Hazelwood*) (emphasis added); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996) ("suppression of a particular viewpoint" may be permissible if "there are compelling state and human interests at stake."); *Kincaid v. Gibson*, 191 F.3d 719, 727 (6th Cir. 1999) (*Hazelwood* prohibits any "viewpoint-based restriction on student speech") *rev'd and remanded on other grounds*, 236 F.3d 342 (6th Cir. 2001) (en banc).

On the other hand, other Circuits have taken the view, now joined by the Tenth Circuit in the case at bar, that *Hazelwood* permits viewpoint discrimination. *See Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (*Hazelwood* does "not require that school regulation of school-sponsored speech be viewpoint neutral"); *see also Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001) (suggesting that *Hazelwood* permits censorship of speech based on viewpoint where necessary to maintain "order and discipline."); *cf. C.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1998) (rejecting position that *Hazelwood* imposes a "requirement of viewpoint neutrality"), *reh'g en banc granted, opinion vacated,* 197 F.3d 63 (3d Cir. 1999), *aff'd by an equally divided court in part, vacated and remanded in part*, 226 F.3d 198 (3d Cir. 2000). Moreover, the Ninth Circuit, though noting its own prior precedent in *Planned Parenthood*, 941 F.2d at 817, holding that viewpoint neutrality is required under *Hazelwood*, recently called that holding into question. *See Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1010 (9th Cir. 2000) (asserting that there is no basis in *Hazelwood* for the conclusion that

viewpoint neutrality applies to censorship of "school-sponsored [student] speech").[4]

Nowhere, however, is the confusion among the Circuits concerning whether *Hazelwood* permits viewpoint discrimination better exemplified than in the torturous history of *C.H. v. Oliva*, the case on which the Tenth Circuit primarily relied in this case. At the trial court level, the court dismissed the student's viewpoint discrimination claim finding that the allegations did not show such discrimination. *See C.H. v. Oliva*, 990 F. Supp. 341 (D.N.J. 1997). The Third Circuit affirmed in an unpublished opinion, *see* 166 F.3d 1204 (3d Cir. 1998), but on rehearing, the same panel of the Third Circuit withdrew its prior opinion, this time finding that the speech had been censored because of its viewpoint, but nonetheless affirming on the basis that *Hazelwood* permitted viewpoint discrimination. *See C.H. v. Oliva*, 195 F.3d at 172-73. The *en banc* court then proceeded to vacate that opinion, *see* 197 F.3d 63 (3d Cir. 1999), but ultimately affirmed the dismissal of the student's viewpoint discrimination claim by an equally divided court, thereby leaving intact the confusion as to whether *Hazelwood* permits viewpoint discrimination. *See C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000).[5]

In short, there is considerable confusion among the Circuits as to whether *Hazelwood* permits viewpoint discrimination, even to the extent of dividing one Circuit down-the-middle. The Tenth Circuit's opinion in this case

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[4]The Ninth Circuit ultimately decided the case on other grounds.

[5]Undersigned counsel was counsel for the plaintiff in *C.H.*

only exacerbates that confusion. This Court should seize this opportunity to restore order to this important area of First Amendment jurisprudence by granting *certiorari* on the first question posed in the petition, and by making unmistakably clear that censorship of student speech based on viewpoint is not permitted under *Hazelwood.*

CONCLUSION

For the foregoing reasons, the writ of *certiorari* to the Tenth Circuit Court of Appeals should be granted with respect to the first question presented by Petitioners.

Respectfully submitted,

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